No. 10014

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 367 to 570

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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MAX RADIN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Max Radin.

Direct Examination

Q. (By Mr. Selvin): What is your profession?

A. Professor of Law, University of California, Berkeley.

Q. Have you ever resided in or visited Germany? A. Several times.

Q. Do you speak and read the German language?

A. I do.

Q. What has been your training and experience in the study of German law?

A. I have been teaching comparative law in Columbia and in the University of California since the year 1918. I have been a member of committees on comparative law. I have paid special attention to the German law in that connection. I am now conducting a seminary in German law. I have been an expert witness on the German law in a number of cases in the State courts of California and the federal courts since 1920. I have written articles on German law in the American leading periodicals and in one German paper.

Q. You are familiar, no doubt, with what in American law we call a judgment in rem? [192]

A. I am.

Q. Is there any equivalent or analogy to that in the German law?

(Testimony of Max Radin.)

A. There are judgments dealing with the status of the family, covered by Book 6 of the Code of Civil Procedure of Germany. There are cases involving family status, covered almost wholly in Book 6 of the German Civil Code of Procedure, which are judgments in rem. Although that term is not used in German law to any extent, in so far as the status determined cannot be attacked laterally once it has been determined by the court. There is nothing corresponding to the judgment in rem involving ownership or obligatory transactions.

Q. Are you familiar with the judgment which is part of Plaintiff's Exhibit 3 and which we have referred to here as the declaratory judgment between the Bank for Foreign Commerce and May Film?

A. I have read that judgment, the original and the translation.

Q. Using the term "judgment in rem" as we use it ordinarily in American law, would you say that is a judgment in rem?

A. If I may refresh my memory by looking at the last part?

The Court: Yes.

A. No, that is a declaratory judgment and, in my opinion, [193] is not a judgment in rem.

Q. In your opinion, under German law, would that judgment have binding or conclusive force upon anyone not a party or a successor in interest to a party to that action? A. No.

(Testimony of Max Radin.)

Q. What generally is the effect of German judgments, from the standpoint of the American law which we call res judicata?

A. They bind the persons who are parties and their privies. They bind no one who is not a party to the action.

Q. Is there, under German law, anything conclusive against one not a party to the action, or not a successor to the party to the action, as to the facts determined in that judgment?

A. No. I may say this, since I am speaking as an expert witness all this is qualified by the term, in my opinion.

Q. That is right. Are there, in the German law, any relationships analogous to what in the American law we call, on the one hand, guaranty, and on the other hand, suretyship? A. Yes.

Q. What American term may be used to express those German relationships?

A. Either the term suretyship or guaranty represents the term "burgschaft" in German law. The German word "garentie" is sufficiently different to be sufficiently [194] distinguished in all doctrinal discussions or opinions of the court in relation to that.

Q. What, in a general way, is the difference under German law between the relationship called "garentie" and the relationship called "burgschaft"?

A. The "garentie" resembles more closely our

(Testimony of Max Radin.)

warranty. That is to say, it is a promise that a certain situation will exist, a certain particular thing will be made good. This promise is absolute, so far as the warranty is concerned. It may be an implied or express condition, but it is essentially different from the obligation of burgschaft. That is to say, the guaranty or suretyship, if I may take advantage of the suggestion of the court speaking from the American preface recently adopted of the German Civil Code, formerly were attempted to be distinguished. But even under the former distinction both would be within the German burgschaft, although the word "garentie" would be noticeably different in its effect.

Q. Is there any difference, under German law, between what in American law we call the rights of subrogation, as between the German garentie and the German surety or burgschaft?

A. There is.

Q. What is that?

A. That unless there is some express stipulation the man who makes the German garentie does not succeed, as a [195] matter of course, to the security. In other words, he is not subrogated unless there is some special contract or agreement that he should be so subrogated. Whereas, the German burgschaft, that is a guaranty or surety in California generally, is by operation of law subrogated to whatever security the creditor has.

Q. Let us assume, under German law, one of

(Testimony of Max Radin.)

the securities which the principal creditor holds is a claim or an obligatory right against a third party; that that claim was transferred to the Bank as security, but by an assignment absolute on its face. Would a claim of that sort pass, by operation of law, to a surety who paid the principal claim?

A. I think not; relying on the same case we mentioned before.

Mr. Hirschfeld: I object on the same grounds previously stated. It assumes facts not in evidence and counsel inadvertently mixed up a hypothetical question with an actual question, your Honor. [196]

Q. (By Mr. Selvin): All right, then; say the creditor, the principal creditor, in place of the word "bank"?

Mr. Hirschfeld: It is still objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Basing my opinion on that same case in volume 89 of the Decisions of the German Supreme Court for civil cases and, further, discussions in the textbooks, the authorized annotated editions of the German Civil Code, I am of the opinion that it would not pass. If the assignment were such as to pass what we should call title to the claim to the creditor, in that case the title would exist and by operation of law the only thing that would pass would be a claim to have that title transferred to paying surety.

Mr. Hirschfeld: We ask that the part of the

(Testimony of Max Radin.)

statement, "Basing my answer upon the decision in volume 89," be stricken on the ground that no foundation has been shown for volume 89, and it is cross examination of the witness.

The Witness: Then, may I say that instead of basing it upon that, in my opinion from my study of the case; and further, from a study of the matter in the annotated editions of the code I am confirmed in my opinion that it would not pass, unless by operation of law. [197]

Q. (By Mr. Selvin): Assuming, Prof. Radin, that the only two stockholders of a German corporation, an ordinary business corporation, enter into an agreement in terms such as is quoted here on page 181 of Plaintiff's Exhibit 3, and which I will ask you to read——

A. You mean these two pages?

Q. No; just the quotation that ends here.

A. I have read that. [198]

Cross Examination

Q. (By Mr. Hirschfeld): Doctor, you state that a judgment in rem, as we understand it in this country, is contained in Book 6 of the Code of Civil Procedure?

A. Such judgments exist there, yes.

Q. Pardon?

A. Such judgments do exist there.

Q. And they refer mainly to matters of paternity?

(Testimony of Max Radin.)

A. Status of family relationship, actions of divorce, paternity. Section 6, as I remember it.

Q. Not having had the pleasure of being one of your students, Doctor, I will ask you what is Book 6, and ask you if you happen to have it?

A. It is right here. Volume 6. This is principally between parents and children. [200]

Mr. Hirschfeld: If your Honor will pardon us, we will be a little bit slow in trying to change a little German back into English, and so on.

The Witness: There is no translation of that.

The Court: Under Section 1908 of our Code of Civil Procedure, which has existed practically without change since enactment of the code, or with slight modification, a judgment in rem may apply as to title to a thing, a will, administration, a condition, or relation to a person.

The Witness: Yes.

The Court: Your statement is that the German provision would apply merely to the relation of a person, and especially to the domestic status?

A. So I understand it.

The Court: Of course, the relation of persons would apply, also, as to marriage or divorce or paternity.

The Witness: Yes.

The Court: But other matters, like title to real estate or the existence or non-existence of a will and competency to make it, and so forth, which would be the subject of judgments in rem, and

(Testimony of Max Radin.)

therefore, binding on all persons as determined in a particular thing, do not have equivalents in Germany?

A. It would bind only the parties to the action or their privies.

The Court: All right. Go ahead. [201]

Q. (By Mr. Hirschfeld): Doctor, does the effect of a title to real property ever, by operation of law or otherwise, become a judgment in rem?

A. If you mean people's rights can be concluded, who are not parties to the action in German law, I would say no. If you mean whether it might be called a judgment in rem in the translations of German doctrine and discussion, I don't know.

Q. To be more specific, if a person in Germany claimed to be the owner of a piece of property and occupied it for many years, and his son and son's son occupied it for many years, and somebody came along and claimed that he was the owner of that piece of property, and a court decided that this claimant was wrong, that he had no interest in that piece of property, could someone who had claimed under this defeated claimant still come into court in a subsequent action and not be precluded by the former judgment?

A. Of course not.

Mr. Selvin: That doesn't make it a judgment in rem.

A. That is precluding the parties to the action and their privies.

(Testimony of Max Radin.)

The Court: That wouldn't be a judgment in rem, because he would be claiming under the other. All you have to do is look at our own judgments. Even our own don't go that far.

Mr. Hirschfeld: I want to get two extremes and then draw a line. [202]

The Court: All right.

Q. (By Mr. Hirschfeld): The law in Germany, under such a situation as I have just described, is similar to that in this country?

A. I think so.

Q. And those who claim under or because of a predecessor in interest are bound by a former judgment; is that correct?

A. That is my judgment.

Q. What is a liquidator in Germany? Is he comparable to what we might term in this country a trustee in bankruptcy?

A. Very much like a trustee in bankruptcy.

Q. And he employs an attorney to represent him? A. He generally does.

Q. The same as trustees in bankruptcy here?

A. He generally does.

Q. He is not a receiver?

A. No. But the difference between the trustee and the receiver in Germany and in the German konkursverwaltung, the German bankruptcy, that distinction isn't so sharply made. They do have officers of the court who are like our receivers and trustees, but those persons have not attained the same definite status as they have in our system.

(Testimony of Max Radin.)

Q. But the main difference between a trustee and receiver might be said, in Germany, to be in this respect: [203] That a receiver here is somebody who is appointed by the court, or someone who occupies a permanent position in a bankruptcy court, such as a referee?

A. A referee, not a receiver.

Q. Yes. A. Appointed by a referee?

Q. Appointed by a referee or by a court?

A. Yes.

Q. The trustee, however, comparable to a liquidator, is appointed by whom in Germany? Who appoints the liquidator? How does he get his job?

A. Through a court.

Q. Through an appointment. And by whom is application usually made for appointment of a liquidator?

A. By the creditors, as with us. Sometimes by the debtor, whose property is being liquidated.

Q. And among the duties of the liquidator is the duty to protect the claim of creditors; is that not so? A. Undoubtedly.

Q. And he does represent the creditors, in so far as the protection of the assets that——

A. Well, I would hardly say he represents the creditors to the same extent as the trustee.

Q. Does he not represent the creditors, in so far as protecting the assets of the business he has taken over? A. To that extent, yes. [204]

Q. And under German law, assuming there was

(Testimony of Max Radin.)

an asset of a business, is it not a fact that jurisdiction rests in this liquidator to go after those assets rather than in any individual creditor?

A. I don't know what you mean by jurisdiction.

Q. Let us say the desire or the power or the right to go into court and to take necessary action to gather the assets. Isn't that something that is in the liquidator's power——

A. In the liquidator.

Q. ——rather than in an independent creditor?

A. An independent creditor ordinarily would not be heard, except by petition.

Q. And he would ordinarily be represented through a liquidator?

A. I am speaking of representation there. If the creditor feels he has rights he would appear in that particular proceeding and try to assert them, but he is not represented by the liquidator in the same sense in which the trustee represents our creditors. [205]

Q. (By Mr. Hirschfeld): The rights and duties of a liquidator are the same whether one succeeds another or whether one continues right on through; is that not so, Doctor?

A. It depends on the authorization of the court. The court may definitely impose duties on one liquidator. But normally that would be the case.

Q. Under what circumstances will a court appoint one [207] liquidator with a right and duty to determine the validity or claim of ownership of an asset, do you know?

(Testimony of Max Radin.)

A. I don't get that question.

Mr. Hirschfeld: I will rephrase it.

Q. Under what circumstances will a court appoint a liquidator with a special duty of determining the validity of several claims to an asset?

Mr. Selvin: I object to that on the ground that it is not proper cross examination; not within the scope of the direct.

The Court: Objection sustained. Let's limit the examination of Dr. Radin to the particular topic. You have your own experts. You are not bound by his testimony.

Q. (By Mr. Hirschfeld): Doctor Radin, is it not a fact that oral assignments are recognized in Germany? A. Yes.

Q. What is there, then, comparable to our statute of frauds, that requires that assignments, or certain assignments under certain circumstances, must be written?

A. We have no such statute that requires they must be written. Q. They can be oral?

A. Yes. Our statute doesn't affect that. In Germany there may be a valid assignment made orally. [208]

Q. In Germany is there not such a thing as an equitable assignment?

A. That I would answer no.

Q. To your knowledge have the courts of Germany ever declared that where an assignment should have been made, and it was apparent that

(Testimony of Max Radin.)

it was the intention of the parties to make an assignment, that the court will give credence to what seems to be the intent and desire of the parties and consider that the assignment was actually made?

A. To that I would say no. If you confine yourself to the first half and say the courts would give credence to the intent of the parties—obviously yes. That is, their intention to make a contract whereby an assignment should have been made, where an assignment has to be made in a special form, or where an assignment exists in a transfer of papers, which has a special state of significance besides the title they represent, and where the title has to be transferred in a special way an agreement is made to transfer the title in that special way, the court would take into account anything which shows the intent. But in my opinion the German law never treats that as done which should have been done, as in the English courts of equity. It merely says it should be done and allows the man to go ahead and try to get it done. [209]

Q. And the Amtsgericht is a court comparable to our Municipal Court, but with a rather limited jurisdiction up to about 500 marks; is that not so?

A. I have forgotten the exact limitation. There is a limited jurisdiction both in the nature of the things it may deal with and also the amount it may consider.

Q. It doesn't have jurisdiction, however, to 50,000 marks, does it?

(Testimony of Max Radin.)

A. As far as my recollection, no.

Q. Then the Amtsgerecht would not be the court of record or court of jurisdiction to determine the ownership of a 50,000 mark claim, would it, Doctor?

A. To determine the ownership of the claim? No.

Q. And the Amtsgericht, purely as an executory arm of the government—of the courts—issue instructions to levy executions without determining the ownership thereof; is that not so; to issue writs, in other words?

A. The Amtsgerecht issues, as far as it is a court of execution, which is a curious kind of institution that we don't quite have—issues executions and attachments without itself having determined the validity of the judgment on which these executions and attachments are based.

Q. As a matter of fact, mere issuance of a writ of execution from the Amtsgericht, then, does not determine whether or not the party seeking the execution is entitled to execution; is that not so? [213]

A. No; that is not so. The person who gets an execution from the Amtsgericht is entitled to execution of that particular judgment. It does not preclude the determination of whether the claim, upon which the judgment was based, was valid. That is a matter for another court.

The Court: But the execution of the Amtsgericht must be based upon a valid judgment of a different court?

(Testimony of Max Radin.)

A. Of a different court. That judgment is in court. The person who has the right to enforce the judgment is prima facie the owner of the judgment.

The Court: Is that when the Amtsgericht issues the writ of execution? The conditions precedent, which has been complied with, is the existence of a valid judgment of another court.

A. Valid on its face?

The Court: On its face.

A. It doesn't go into that. The person who is the owner of that judgment may execute it.

Q. (By Mr. Hirschfeld): Where A is the named plaintiff in a case where he has received a judgment, and A has sold or transferred or otherwise conveyed his rights in that judgment to B, and B wishes to have the Amtsgericht issue its attachment, when B shows to the Amtsgericht his papers whereby he becomes the owner, the Amtsgericht without questioning those papers will issue its writ, will it not?

A. Not necessarily. The person claiming to be an [214] assignee of a judgment must, in proper form, get that judgment transferred to him. It may be done by showing the chain of title. It may be done by making a special motion or bringing special action of a sort to get that judgment turned over to him. The Amtsgericht, to be sure, may sometimes take for granted that all papers are in order and issue the judgment in the name of the assignee. If the Amtsgericht made any error there

(Testimony of Max Radin.)

that can be corrected, but some special thing must be done by the assignee to get the judgment transferred to him. The mere having the assignment, whether oral or written, whatever the case may be, would not in itself entitle him to execute the judgment which is in the name of some other judgment creditor. He must definitely become the judgment creditor of that judgment.

Q. However, he can become the owner of that judgment without going into the Amtsgericht and having the Amtsgericht do anything about it, if he does not want an execution?

A. It would be difficult to see what the owner of a judgment would own, in Germany, without the right to execute the judgment. It would mean merely, at most, the right to have this execution issued to him after having established his right to the judgment.

The Court: Suppose he had an assignment in his pocket. What good would it do him if there was no recognition of that [215] right in the court that rendered the judgment?

A. I can't say that it would do any good, except that it might pass to him the claim he has.

The Court: The promise.

A. The promise to apply that judgment to him.

The Court: That would not prevent the original judgment creditor from seeking, if he were dishonest, execution on the judgment which has not been officially assigned for the record of the court?

(Testimony of Max Radin.)

A. I think he would be acting mala fides there, of course, but he would have a valid execution and the sheriff, or the marshals who are doing the execution, would be protected by the writ of execution.

The Court: Yes.

Q. (By Mr. Hirschfeld): Doctor, is it not a fact that many judgments in Germany are paid without an execution, or some?

A. I am speaking as an expert on German law. I don't know what the experiences of Germans are.

Q. Is it possible, under German law, for a judgment to be satisfied where there has not been any execution of the writ of attachment issued?

A. It may be paid, and from that time on the judgment creditor who, if the judgment debtor pays the debt and doesn't in some way or other secure to himself the judgment, the receipt which would enable him [216] to bring a defense in case he is ever sued again, or defend himself in case his property is seized by the proper authorities—he may be acting very unwisely, but it is possible, in other words, that a man may be paid and still subject himself, through his inadvertence, to paying again. But if you ask how judgments are satisfied, that is definitely provided for in the Code of Civil Procedure, and is done by securing the legal papers which indicate that this particular execution may no longer exist. There are legal papers to that effect. I don't believe that there is any mark of a satisfaction put on the records as to the fact; that

(Testimony of Max Radin.)

is done by handing him documents which will protect him against another execution on that same judgment.

Q. Is there no such thing as satisfaction of judgment filed in the Landgericht or in the Kammergericht?

A. My own experience in actual German practice, of course, doesn't exist, because, naturally, as a foreigner in Germany I couldn't practice there. I only know the law as I see it in the books and discussions. I know of no such procedure as ours, in which satisfaction is put on the books, that from that time on no court could issue execution.

The Court: How would they indicate that a particular judgment is no longer subject to execution?

A. By handing this man this paper, of which some record is kept in the court. But it isn't in the same court. The Amtsgericht is the execution court. [217]

The Court: You say it isn't in the Amtsgericht?

A. It is in the Amtsgericht, the execution court.

The Court: But not in the other court?

A. I don't think so, but, as I say, I haven't gone into that.

The Court: That would have the same effect, wouldn't it?

A. That would have the same effect, because obviously, in Germany or in the United States people don't pay judgments twice if they can help it.

Q. (By Mr. Hirschfeld): The Amtsgericht,

(Testimony of Max Radin.)

however, is very limited in its geographical and territorial jurisdiction, is it not? A. Yes.

Q. There are very many Amtsgerichts in Germany?

A. Many Amtsgerichts in Germany.

Q. And is it not a fact that the Amtsgericht, to which you go to get an execution, is the Amtsgericht in charge of the district in which the defendant lives? A. That is the rule.

Q. Do you know how many Amtsgerichts there are in Berlin? A. A great many.

Q. You would not say, Doctor, that there is no way of satisfying a judgment in the Kammergericht—— A. I wouldn't say that.

Q. ——without going and bothering the Amtsgericht, [218] would you?

A. I wouldn't say that. I don't know.

Q. Doctor, you stated as your opinion, after you had read the Exhibit 3, page 181——

A. Exhibit 3. One moment.

Q. You recall a somewhat lengthy hypothetical question which started off, "Assuming that two stockholders of a business corporation make an agreement?"

A. Yes, I remember that question. I don't remember whether it is Exhibit 3 or not.

Q. Doctor, would your answer be the same if, at the time the agreement was made, there were no creditors and if, at the time other creditors came into being, they did so with knowledge of a consent to the agreement that was made?

(Testimony of Max Radin.)

A. I would like to get the question more clearly in mind. It was a long question. I hate to ask the reporter to read it over again, but I want to get the background of your conditions, if I may ask the reporter to read that.

The Court: Mr. Selvin's question?

A. Mr. Selvin's hypothetical question, which I answered, and which counsel wants me to answer again with two new conditions in it.

Q. (By Mr. Hirschfeld): If you will allow me, Doctor. I have made some notes. I will rephrase my question and I will try to include the entire question. Assuming two stockholders of a business corporation make an agreement [219] according to page 181 of Exhibit 3, and assuming that after the agreement is signed a judgment, according to Defendant's Exhibit C, is given, and assuming that a judgment or order, per Exhibit D, is given, and assume that among the assets of this business corporation was a claim for 50,000 marks. You stated that in your opinion, substantially, that the result of that document was that the person served was enjoined or the money in his possession was sequestered so that he could not pay.

A. I remember that.

Q. Would your answer be changed—I am sorry, I have the wrong answer. I guess you said that wasn't a valid assignment. Would your answer be changed in any way if there were added to this question two additional factors; first, that at the time the agreement was made the company was

(Testimony of Max Radin.)

solvent and had no creditors and, the second fact, that such creditors as later came into being did so with knowledge of this agreement and having consented thereto?

A. I can't answer that unless you tell me whether it includes something in my mind, namely, whether one of the creditors that came into being is the creditor that brought the action which is represented by D.

Q. Let us add that additional fact, that that creditor came into being after the assignment had been made, had knowledge of it and had consented thereto after the agreement had been made. [220]

A. If the creditor who attempts, by attachment, to sequester property in the hands of a particular person, the only question is whether that property is in his hands.

Q. I am sorry. I confused you, Doctor. I mean, would you still say that the assignment wasn't good?

Mr. Selvin: He never did answer that the assignment wasn't good.

A. I don't remember that. I am surprised at your saying that.

Mr. Hirschfeld: I am sorry. I tried to write it out as fast as the Doctor talked, and I guess I missed.

The Witness: I don't remember saying that.

Q. By Mr. Hirschfeld: Would you answer the question with respect to the assignment?

(Testimony of Max Radin.)

Mr. Selvin: I object to that as not a proper question. I didn't ask him whether the assignment was valid or invalid. That was the question I asked Dr. Golm.

The Court: He may answer.

A. I can only answer this: That unless there are some matters involving mala fides, so that it is contra bonos mores, against good morals for the man to make the claim, it seems to me all that is asked for, in German law, is that when the attachment, the garnishment, is served, is there property in the hands of the garnishee which is covered by that garnishment? In that case that property is sequestered. It may be that the garnishee is acting mala fides in making [221] the sequestration. That is a different question which I know nothing about. [222]

Redirect Examination

Q. By Mr. Selvin: It is true, is it not, Doctor Radin, that under German law a particular transfer of a claim may be valid and adjudicated to be valid as between the parties to the transfer, and still be invalid as to creditors of the transferor?

A. That is correct. [237]

Q. And when that is the situation as against creditors of the transferor, the particular claim is deemed to be the property of the transferor?

A. That is generally true as to fraud among creditors.

Q. When that is true an order of assignment

(Testimony of Max Radin.)

and attachment, issued at the instance of the creditor of the transferor, would attach the claim as the property of the transferor?

A. That is the general principle of German law.

Mr. Selvin: That is all.

Recross Examination

Q. By Mr. Blum: Your answer there assumes that the creditors were in existence at the time of the assignment between the parties?

A. No, it did not assume that. It assumes that they were creditors who, under the German law, had a right to challenge the assignment.

Q. Those are prior creditors?

A. Not necessarily.

Q. Would that apply to subsequent creditors with knowledge?

A. It might. It depends upon the circumstances.

The Court: Is that all.

Mr. Blum: That is all. [238]

E. O. F. GOLM

recalled as a witness in behalf of defendant, testified as follows: [240]

Cross Examination

Q. By Mr. Hirschfeld: Dr. Golm, it is permitted under German law, is it not, for a man to put up, as security for his guaranty or endorsement, personal property—movables?

(Testimony of E. O. F. Golm.)

A. Surely.

Q. Are you familiar with what we call, in this country, a collateral loan note?

A. Well, I am to a certain extent familiar with it, as far as the use of the banks is concerned, who always ask for collateral for a loan, for instance.

Q. You are not familiar with the form?

A. Well, I had a certain experience with one of the American banks, so I am familiar to a certain degree. I wouldn't say I am completely familiar with that matter.

Q. It is necessary in Germany for the owner of personal property, who wishes to guarantee and secure a debt with a pledge, to use a special form, or not?

A. You are speaking about corporeal things?

Q. Movables.

A. Movable things and tangible things given as a pledge?

Q. Yes.

A. In our law this would be done in this way: That the pledge itself is delivered to the bank. May I use the instance which appears in this case, a stamp collection? In order to be pledged it has to be delivered to the bank. [242]

Q. Is any letter or document or assignment needed?

A. In this case not, because it is a corporeal thing.

The Court: You are speaking of the stamp collection?

(Testimony of E. O. F. Golm.)

A. The stamp collection; not about the claim.

Q. By Mr. Hirschfeld: And the same thing applies to the furniture and jewelry, and to a play—a story? A. A story? No.

Q. A story? A. No, I wouldn't say so.

Q. What is necessary with a story?

A. A story as itself is not valuable as a thing, a copy of a book or something. But the copyright is valuable. In this case the copyright has to be pledged. This requires another transaction.

Q. How is a copyright pledged?

A. The copyright pledge is in the same way as you would assign a copyright, with one difference; that is, you would say, "I don't assign it to its full extent, but I assign it"—"I transfer it," would be the better term, "to you as a pledge; as a lien or pledge."

Q. Must this be in writing?

A. Not necessarily. For instance, if you deliver a copy of this book and there is complete understanding about this, it could be also done without a written document.

Q. How is a judgment pledged?

A. A judgment, as such, can never be pledged, because a [243] judgment is a document which is the proof in which is vested a claim. The claim resulting from this judgment or confirmed by this judgment can be pledged.

Q. You said yesterday that if a claim is assigned the judgment follows the claim?

(Testimony of E. O. F. Golm.)

A. If a claim is assigned—are you speaking about the pledge, now, or about the assignment? It is quite different.

Q. I asked you how can we pledge a judgment. You said you cannot pledge a judgment.

A. You can pledge the claim.

Q. You can pledge the claim? A. Yes.

Q. When you pledge a claim on which there is a judgment how is this done?

A. This has to be done in this way: That I give a declaration stating, "I herewith pledge the claim, which is dealt with and which is fixed in this judgment, to you, as my creditor." And since the judgment itself—I mean the piece of paper is a tangible thing it would be far more necessary that I deliver this corporeal thing to the creditor.

Q. What is the corporeal thing that you would deliver? A. The piece of paper.

Q. What piece of paper?

A. The judgment rendered by the court. But this is not a necessary—that is not the principal thing which is necessary in order to pledge a claim. As I said yesterday, [244] the judgment follows the claim.

Q. Yes.

A. If the claim is assigned to full extent and to full right then there is no doubt that the creditor has the right to claim the judgment, also, and there is no doubt, either, that in this case the creditor is entitled to a further step, which I wanted to point

(Testimony of E. O. F. Golm.)

out yesterday. He must have transferred in his name the so-called Vollstreckungsklausel. I avoided the English word "writ of execution", because it doesn't cover the Vollstreckungsklausel.

Q. I am interested in knowing not how many things we can do; I would like to find out the least that has to be done, the very least that we need to do to effect an eventual transfer. Therefore, if, in a hypothetical case, a corporation goes to a bank and asks the bank for an open credit—is this phrase familiar?

A. Yes, it is familiar to me.

Q. Please excuse me if I——

A. No. I would say it if I don't know the term.

Q. Thank you very much. ——and the corporation says to the bank, "We want an open credit of 90,000 marks." And suppose the bank says, "We are not satisfied to give you on your own promise that amount of money. You must give us some additional promise." And suppose that, in this hypothetical case, Mr. May says, "I personally will guarantee to the bank that if the corporation does not pay this debt [245] that I will pay." And the bank says, "This is not enough." And Mr. May says, "Then I will guarantee, my wife will guarantee, and together we will give you, as a pledge, first, a stamp collection; second, furniture; third, jewelry; fourth, a claim that I have against another company which has gone to a judgment. I will give you all this for this money." And the bank says,

(Testimony of E. O. F. Golm.)

"No, this is not enough." And there comes to the bank a man by the name of—wait, we will stop there for a moment. Suppose here that the bank says, "All right; that is enough." And Mr. May delivers to the bank, as is required under Germany law, the stamp collection, the jewelry, makes a paper for the furniture that is in the warehouse and gives the bank the right to take the furniture from the warehouse—in other words, constructive delivery.

A. Yes. That is the right term.

Q. ——and the bank says, "Good. We are satisfied." And in connection with the deal, upon this understanding, Mr. May also delivers to the bank an assignment of the claim which has gone to judgment. A. Yes.

Q. All with the understanding and a part of this whole transaction. It being understood, partly in writing, partly orally, that if the May Film Company paid the bill that the bank will release Mr. May, will release Mrs. May, will give back to them their property and all will be well. [246] Under those circumstances, if the May Film failed to pay and the bank called upon Mr. May to pay, and Mrs. May, and they did pay the bank, would Mr. May and Mrs. May be entitled to receive back from the bank all of the securities and pledges and pawns automatically, under Section 774?

A. Now, the facts you gave me to be assumed have different parts. If I have to suppose to be true the latter part of your explanation, that after

(Testimony of E. O. F. Golm.)

an oral understanding was reached between the contracting parties then Mr. May, as you said, made out a written assignment to the bank and assigned this claim to the bank to its full extent, then my answer would be divided into two parts. First, the writ of assignment has the preference before any old negotiations and dealings before. For the interpretation of this legal transaction in the first place, the written assignment has to be examined, and if there is a contradiction, then might come up the question of how far we could go back to the negotiations before. If there is a written assignment of this claim, in consequence of the facts which you so kindly ask me to assume to be true, I am quite sure about my answer, and the answer is the same which I gave Mr. Selvin yesterday. There would be no transfer by operation of law, according to Section 774 of the German Civil Code, although on these facts which you give to me, and which are partly different from the facts given yesterday, there is no doubt that in this case there would [247] be a real suretyship assumed by Mr. May and Mrs. May in the meaning of Section 765 of the German Civil Code. This is the section which says, "If somebody promises to be liable for an obligation of another party he is a suretyship." The first section of the title "burgschaft"—suretyship. But when you ask me to assume that in consequence of all these negotiations Mandl assigns the claim to the bank——

(Testimony of E. O. F. Golm.)

Q. I didn't mean to confuse you by saying Mandl.

A. May. May. I made a mistake. I had in mind May, too. May assigns the claim to the bank. And may I ask, was this the assignment which was produced yesterday? Then there is no question that he never acquired the right by virtue of law, but there is also no question that he acquired the right to be released and to be reassigned with this claim which he had given as security. The method of facts upon which I base my opinion are given in one of the reports which I was quoting yesterday. At this time I have to make a little differentiation or addition. At this time Mr. Mandl did not come into the picture yet?

Q. That is right. A. Yes.

Q. You have continuously assumed that there was a direct, absolute, unconditional, unlimited assignment from Mr. May to the bank, in all your answers, have you not?

A. Unlimited, unconditional? I wouldn't say. An [248] assignment, in the meaning of the German law, as I was asked to assume——

Q. Well, your answers, then, have been based upon an assumption that the assignment to the German Bank was absolute, unconditional and unlimited? That is correct, as I understand you.

A. It could have certain conditions, but it must have been a real assignment. There can be no doubt about the conception of "assignment," I think.

(Testimony of E. O. F. Golm.)

It is just the same conception in the American law as in our law.

Q. I am sorry. I failed to make myself clear. I will try it this way: An assignment that simply says, "I assign this claim to you"——

A. Yes, that is better.

Q. That is a straight, absolute assignment; is that right? A. Yes.

Q. An assignment which says, "I assign this to you as security"—— A. As a pledge.

Q. "as a pledge," that is not absolute?

A. This is just what you asked me in the first place. This would mean, "I pledge this claim to you," in other words.

Q. I am trying to distinguish it in this way: The answer to my questions about the operation of Section 774 are based upon an assumption that the assignment of the [249] claim to the bank by Mr. May was in this first form, "I assign the claim to you"; and no more?

A. There could be more.

Q. But if the assignment was, "I assign the claim to you as a pledge," then your answer would be different as to Section 774, would it not?

A. In this case my answer would be different, but the document shown to me didn't contain these words. It was just the opposite.

The Court: Let us use the word that applies to both. Let us use "hypothecate".

(Testimony of E. O. F. Golm.)

The Witness: Hypothek is only applicable to real estate.

The Court: That is right, but we can use the word "hypothecate" in the same sense.

The Witness: Yes, in the meaning of pledging it.

The Court: Yes. There were no conditions of hypothecation in the document that you were shown?

A. No; just the opposite.

The Court: Just the opposite? A. Yes.

The Court: They state that it was an assignment?

A. I don't have it before my eyes, but I am speaking from my memory. It says, after certain facts have been mentioned, "I hereby assign this claim to its full extent, with all accessory rights and with all interest, to the Bank for Foreign Commerce." That was what I was asked and, of [250] course, if you give me other facts, then my answer must be different.

Q. By Mr. Hirschfeld: Doctor, as a witness, of course, you are not testifying as to actual facts?

A. No.

Q. We are asking you hypothetical questions.

A. Yes.

Q. So that when Mr. Selvin asks you one hypothetical question on which happens to be his side of the case, you may answer that. When I ask you one—I am permitted, I believe, to ask you other hypothetical questions, and you do not have to refer back to additional facts. A. No.

(Testimony of E. O. F. Golm.)

Q. Then you may show me what are the words?

A. You want to see the English or the German?

Q. Either one; the English preferably.

Mr. Selvin: Let the record show that the witness has Plaintiffs' Exhibit 5 before him.

A. "With these premises I hereby transfer and assign to the Bank fuer Auswaertigen Handel Aktiengesellschaft Berlin S. W. Marksgrafenstrasse 41 the above mentioned claim and judgment together with interest and all other rights to its fullest extent." So if I am asked what this is I could only say, as an expert on German law, that there can be no doubt that this is a full assignment.

The Court: What you are reading, Doctor, is the purported [251] assignment contained in that letter of February 12? A. Yes, the quotation.

The Court: The letter of February 12, 1936, sent to Universal Pictures Corporation by the Bank?

A. That is right.

The Court: Part of Exhibit 5?

A. That is right. That is the German text. And the German text, if there is a difference, it is even clearer than the English.

Q. By Mr. Hirschfeld: Referring to the English,—and if it isn't a good English translation please correct it for me, because I am relying upon the English translation, as I do not have the knowledge of German that the court and others here have —I call your attention again to where it says, "I assign the above mentioned claim and judgment,

(Testimony of E. O. F. Golm.)

together with interest and all other rights to its fullest extent." Does this not mean that I assign the claim and judgment and the interest and all of the rights to execution and do whatever you need to do when you have a judgment; complete?

A. It is a complete assignment.

Q. I mean, does it not mean that I am assigning a judgment with all of its rights complete?

A. Yes, but you asked me whether he was entitled to have it back, and this follows from the first part of it. [252]

Q. If we assign a judgment, together with all of its rights and privileges to be exercised to its fullest extent, does this not possibly mean, as you read it over, that I do not assign the judgment away absolutely and deprive myself of it, but I am assigning the judgment with all of its privileges so that you may execute on it? Could not that be the interpretation here?

A. Shall I interpret this from this paragraph or from another hypothetical case?

Q. From this paragraph.

A. From this paragraph, I would answer no, because he says, "With these premises I herewith assign."

Q. That is the question, then. He assigns it subject to some premises?

A. He wants to call attention to the premises.

Q. And in the statement of the assignment he refers here to 12 lines or so, above it, reciting the

(Testimony of E. O. F. Golm.)

premises. Now, it says, "Under date of February 9, 1933, the following assignment was given our Bank as security." I am referring to the Bank's letter, now. A. Yes. [253]

Q. What I would like to call your attention to first is this: In the letter, before they quote the assignment, the Bank states, "Under date of February 9th, 1933, the following assignment was given our Bank as security for our claims against May Film A.-G. in liquidation, Berlin." Does this not convince you and show to you that the claim was not assigned absolute, but was assigned as security?

A. It convinced me that it was assigned absolutely as security. We have this assignment as security. But it wasn't a pledge. It is just the opposite of a pledge.

Q. You are going to make a distinction between the assignment of a claim as security and the assignment of a claim as a pledge? That is the difference?

A. That is the real point.

Q. I would like to go on just a little further with our hypothetical question. Now, keeping in mind what I have said before about Mr. May going to the bank and arranging a loan, he and his wife put up certain security as a pledge, and [254] suppose the Bank says, "I am not yet satisfied that the corporation is good or that you, Mr. May, are good, or that Mrs. May is good, or that your jewelry, your furniture or stamps will be good enough secur-

(Testimony of E. O. F. Golm.)

ity. I want something more." Suppose, then, Mr. Mandl goes to the Bank and says, "I want you to make this open credit to the corporation", and the Bank says, "Will you guarantee it?" He says, "No"——

A. Mr. Mandl says, "No"?

Q. Yes. ——"I will not guarantee to you that the May Film Corporation will pay the bill, but I guarantee that if Joe May, who has promised to pay the bill, does not pay it that then I will." [255]

The Court: We are going into a lot of supposition as to what did occur and what didn't occur. The fact remains that the basis of that entire thing is the letter or notice. In it is a purported assignment. The main question before the court is what, if anything, is the effect of that; not what happened. You cannot bind Universal by anything that occurred between Mr. May and the Bank, when the basis of their claim is what they themselves have delineated in this notice. You couldn't put Mr. May on the stand now and prove an understanding that this was to be for hypothecation only, and destroy the effect of the notice, the so-called assignment upon which the claim passed. It is entirely contained in its notice to Universal. You can't go beyond that notice. You have to interpret that notice in the light of what it says. It isn't ambiguous. It says specifically, "This is the basis of our claim." Evidently it was prepared by their counsel. They give the section of the Code of Civil Procedure,

(Testimony of E. O. F. Golm.)

under which certain occurrences are given certain effect. So it can't be speculated as to what might have occurred there, or you can't produce Mr. May to testify what happened. Mr. May could not intrude, because the rules of evidence would be contrary to it. To permit the introduction of what actually took place, what the transaction was, would [256] be to destroy the effect of this instrument, which is the only basis of the claim against Universal, so far as the ownership of the claim is concerned. So I will sustain the objection to the question on the ground that it assumes facts not in evidence. It is an attempt to modify the terms of the notice which sets forth the basis of the Bank's contention that Mandl was subrogated to the claim against May Film. Now, you may go on to something else. [257]

Q. When you had Exhibit 5 in your hand yesterday did you not say that, for the purpose of determining suretyship as you were discussing it at the time, it was quite clear what Mr. Mandl had done, but that it wasn't quite clear and conclusive what Mr. May had done?

A. I cannot recall that I have made the statement, examining this document this morning, that it is completely clear to me what Mr. Mandl—you don't mean Mr. May?—what Mr. Mandl had done, but not clear what Mr. May had done.

The Court: The question is, did you make such a statement yesterday? A. I can't recall it.

(Testimony of E. O. F. Golm.)

The Court: Then, that answers it.

Q. By Mr. Hirschfeld: Will you tell me what you did say?

A. Examining this document, and from my recollection, I said it appears to me to be completely clear that Mr. May made an assignment, to its full extent of all interest and all rights, to the Bank, with certain premises. These premises indicate that this assignment was meant for the purpose of security, but was a real assignment. And as far as I recall, [260] furthermore, in this connection I referred to a decision of our Supreme Court which is applicable to this case, in my opinion.

Mr. Selvin: I don't want to suggest to put anything in anybody's mouth, but I think I know the answer which Mr. Hirschfeld has in mind.

Mr. Hirschfeld: Will you tell it to me, with your Honor's permission?

The Court: Yes.

Mr. Selvin: In an entirely different connection, when I was examining the witness as to the difference between garentie-versprechen and burgschaft, the court and I asked the witness if, in Mr. Lenk's testimony in his deposition, there was any indication as to what the relationship between the parties was. Dr. Golm said, no. The court asked him if there was any indication in this letter as to what the relationship was, and Dr. Golm said that the term "burgschaft" was used in connection with

(Testimony of E. O. F. Golm.)

Mandl's relationship, but there was nothing to indicate what May's relationship was.

The Court: That was it.

The Witness: That's it.

Q. By Mr. Hirschfeld: Doctor, is it not a fact that under German law you cannot assign a claim and a judgment as security without making an absolute assignment?

A. Yes, you can. You cannot assign it as security [261] without making an assignment; is that your question?

Q. Yes.

A. Of course, you cannot assign it without making an assignment.

Q. In absolute form?

A. The conception "assign" indicates that you have to make an assignment. But if you want to ask me whether you can pledge it without making an assignment; no, they will want a pledge.

Mr. Hirschfeld: Your Honor, I want to straighten out a word that is translated as "lodgment". I have the law on that. I want to bring it out. I think there is a distinction.

Q. The assignment in its form must be absolute, is that not so, even though it is understood that it is as security?

A. The assignment in its form must be absolute, even if it is understood that it must be security; but security is not to be replaced by pledge.

(Testimony of E. O. F. Golm.)

Q. Now, you cannot pledge a claim without assigning it, can you?

A. I can pledge a claim in making out an assignment, or better to say "transfer as a pledge".

Q. You do have to transfer the claim, do you?

A. As a pledge, with an addition. I mean, you have to make an addition to an absolute assignment. If you want to express that, you don't assign it as a usual assignment, but [262] as a pledge.

The Court: Let me see if I get it. In other words, the main idea is this: In order to transfer ownership in a claim you have to assign it and you use the words, "transfer the claim"; is that right?

A. Yes.

The Court: Then, if your assignment is for security you would add to the words of assignment words indicating that it is for security. Is that what you mean? A. That is not necessary, your Honor.

The Court: It is not necessary?

A. That is not what I mean. I mean the form of giving a pledge, or security with a claim, is the same form which is applicable to an assignment. But there is a difference. If I use the word "assignment", which means in Germany "abtretung"—

The Court: Yes.

A. Then it follows the rule given for assignments, in Section 398 and following, of our German Civil Code.

The Court: Yes.

(Testimony of E. O. F. Golm.)

A. This is a real assignment, which doesn't exclude that this real assignment is to be a security, to constitute a security, and which would lead to the consequence that after this purpose has been fulfilled to the creditor he has to reassign to me. But if I don't want to give an assignment to the full extent, but only so that the creditor [263] acquires a lien, a pledge on this claim, then I have to make this clear, in addition to my other declaration, to say, "I herewith transfer or assign"—maybe this could be also used—"assign the claim as a pledge." A security is also some kind of a fiduciary relationship between the creditor, and in virtue of this fiduciary relationship the creditor acquires the claim given to him, to its full extent, and can execute all the rights, flowing out of this claim, against everybody, with the only restriction that in the interrelation to him——

The Court: He must act in good faith?

A. ——he must act in good faith and has to reassign after the purpose is fulfilled.

The Court: Yes.

Q. By Mr. Hirschfeld: Now, Doctor Golm, if an assignment is made with words of transfer, and both parties know and understand that it is as a pledge, it will still be a pledge without that particular word being in it, will not not? It does not all have to be in writing?

A. I would say it is what we call "Sicherungs abtretung", an assignment as security, but which is

(Testimony of E. O. F. Golm.)

an assignment and not a pledge. The difference, if I may explain this: That for the outside world, for every third person the creditor, who acquires a claim for security by assignment, is the legitimate holder of the claim. While a creditor who acquires a claim, as a pledge only, is [264] restricted in his rights, and there is always the owner of the claim who comes into the picture with it.

Q. Suppose the principal debtor defaults in an instance where he has pledged a claim; for instance, May defaults and has pledged the claim to the Bank. Can the Bank execute and operate on that assigned pledge?

A. Well, now, he assigns it as a pledge?

Q. Yes. Can the Bank act on it immediately?

A. The Bank can act, but there is a certain procedure that the Bank has to comply with.

Q. In other words, it has been transferred to the Bank?

A. As a pledge. It is a hypothetical question. Shall I answer the question, has it been assigned to the Bank or transferred as a pledge? Then, I would say on this document, it has been assigned. But this doesn't exclude that another transaction can't be made as a pledge.

The Court: In other words, the existence of it doesn't exclude any collateral agreements which are not set forth?

A. Oh, yes. I would say this document excludes collateral agreements, in so far as we have the rule

(Testimony of E. O. F. Golm.)

that if there is a written agreement this is the crux of the matter and decisive. And the one who wants to claim that another transaction has been made has to state and to make clear why this other transaction was not incorporated into the document.

The Court: We have the same rule. Ultimately, I think [265] the general fundamental principles underlying human relations are the same. We always assume that everything is in a written contract.

Q. By Mr. Hirschfeld: Doctor, what is the difference in procedure and in results, if any, between an assignment made as a pledge and a straight assignment where there has been a default?

A. Well, the difference in the procedure is not very strict. You mean in order to seek satisfaction out of the claim? The differences are not very strict. There are certain differences. If you want me to I can give you the code which deals with——

The Court: You might state in a general way.

A. In a general way, in cases where there is only a pledge concerning a claim the creditor, by pledge, cannot act completely independent of the owner of the pledge, who is still entitled to the claim to a certain degree.

The Court: And the other assumes a straight assignment.

A. He is completely free to do——

The Court: Just as the holder would be obligated only to account to the owner?

(Testimony of E. O. F. Golm.)

A. That is right. He has certain obligations against the owner.

Q. By Mr. Hirschfeld: Do you mean, then, that if a [266] claim has been assigned as security, without the word "pledge", that the provisions of Section 774 do not apply at all?

A. Now, I have to proceed upon the assumption the document reads, "I herewith assign this claim as security," shall I not?

A. "I herewith assign this claim as security."

Q. By Mr. Hirschfeld: Yes.

A. This would be—I have to translate it. A literal translation would be "sicherungs abtretung" —abtretung is assign; sicherungs is security—which is not in the legal structure, but in effect similar to a pledge, but has different effects. And even though I assume that the words, "I assign as security," would be added to this document, it would still remain a sicherungs abtretung, which means that the Bank acquired the claim to its full extent and its full right but with the understanding that it was a security and had to be given back after the purpose of the security was no longer in question.

The Court: Would you follow it up by saying how far the security would apply?

A. In this case Section 774 would not apply, because this section applies not to cases where a creditor is under the obligation only to give back the security. It applies only in cases where there is a transfer by virtue of law. And it [267] wasn't

(Testimony of E. O. F. Golm.)

possible in a case like this. The decision which I showed you yesterday in Volume 89. [268]

Q. By Mr. Hirschfeld: Is there any doubt in your mind that the assignment from Mandl here would be constructed by the courts of Germany as an assignment for security?

A. This assignment?

Q. The very one you have in front of you—from May, I mean.

A. Without the letter of the Bank this document is an assignment for the purpose of security. It doesn't mention the purpose of security, but it has to be interpreted as an assignment for the purpose of security; but since it is a full assignment the Bank is the full creditor.

Q. But it is claimed, is it not, from reading this letter, that the assignment was for security?

The Witness: I answered this more than once, and I can't retract from my statement. I think my opinion is truly clear.

The Court: Then we will let the answer remain.

Q. By Mr. Hirschfeld: Is it not a fact, Doctor, that with respect to a claim that has been reduced to a judgment [269] you cannot sell it outright?

A. Pardon me. I didn't get the question.

Q. Is it not a fact that where you have a claim that has become also a judgment, that you cannot sell it outright from one to another?

(Testimony of E. O. F. Golm.)

A. The German word for sell is "verkaufen". I mean, I can sell a book. And I can sell a claim, but through the transaction of selling only, the ownership is not transferred. In order to transfer the ownership of a thing I have to deliver it; and in order to transfer the ownership of a claim I have to assign it.

The Court: Can't you sell a right? We have a phrase, which is mongrel French and English, which we call "choses in action".

A. Oh, yes.

The Court: Is there such a thing as a transfer of a chose in action, a right to pursue a remedy, a right to sue somebody in a civil court for a claim?

A. Yes. I can sell any right whatsoever. The only thing is that we have a very precise distinction between the so-called "schuldverhaltnis"—the obligation created by a transaction, which we call "schuldverhaltnis", and the accomplishment of the obligation through assigning the right and transferring the right.

The Court: Yes. In other words, the sale, as we would call it, is the motivation; the agreement which results in [270] the transfer and precedes it?

A. That is correct, your Honor. I could, for instance, make out a contract and say, "I am willing to sell this to you." And the other person may accept it. Then I have to fill this contract and deliver.

(Testimony of E. O. F. Golm.)

The Court: Yes.

Q. By Mr. Hirschfeld: Now, Doctor, with respect to the method of transferring the claim where you have sold it, would you not also use the word "abtretung"?

A. If I sold the claim? Of course, as I said before, in order to accomplish my obligation arising out of this sale I have to assign it—abtretung.

Q. Yes. And if you transfer a claim to a trustee—is that word familiar to you, Doctor?

A. Yes.

Q. If you transfer a claim to a trustee the trustee could do certain things?

A. Yes. Fiduciary.

Q. Fiduciary. You also use "abtretung" in the case of a fiduciary, in the transfer of a claim and judgment; is that not so?

A. That can be so and will be so in many cases.

Q. I don't mean that is the best way, but it can be done? A. It can be done, yes.

Q. Yes. And to transfer a claim as a pledge you have [271] to make words of "abtretung"?

A. No. To transfer a claim as a pledge I wouldn't use "abtretung". I would use the word "verpfaendung".

Q. But you can use the word "abtretung"?

A. No. If I use the word "abtretung" it isn't a pledge.

Q. But you can use the word "abtretung" with an addition?

(Testimony of E. O. F. Golm.)

A. If I make it clear to the world that it isn't an assignment, but a pledge.

Q. Yes.

A. I wouldn't use the term, but I would use a term that is understandable.

Q. Doctor, will you please refer to the German Civil Code and tell me if Section 239 defines a surety? A. 239?

Q. Yes. I have a book which you have already warned me, Doctor, is not a perfect translation.

Mr. Selvin: Do you have the translation by the Chinese? A. 239 doesn't——

Q. By Mr. Hirschfeld: Pardon me; 232.

A. 232 does not give a definition of what is a surety. It uses the term "surety", which is defined in Section 765.

Q. Well, 232 relates to the giving of a security, does it not?

A. Section 232 is, if somebody is under the obligation to give security, how can he fulfill this obligation. And Section 239—— [272]

Mr. Selvin: 232.

A. 232 indicates different ways of doing so. For instance, first he may make a deposition of money or security—it means stock or something like that.

Q. By Mr. Hirschfeld: Pardon me, Doctor. I don't want to get too far away. Will you tell me first if the beginning of the section is correctly

(Testimony of E. O. F. Golm.)

translated as follows: "If a person has to give security he may do so"—then the way. Is that about right?

A. I would literally translate it, "A person who is under the obligation to give security can do so in the following manner."

Q. Does he have to be under the obligation?

A. Yes.

Q. Or can it be a voluntary giving?

A. No. Under this section he has to be under the obligation, because it says, "wer sicherheit zu leisten hat"—"one who has to give security."

Q. But cannot this obligation arise out of his agreement? A. Surely.

Q. That is what I mean.

A. It must not necessarily be an obligation created by law.

Q. By admission? A. By admission.

Q. He can lodge money or negotiable instruments. That [273] is the word in the translation I have. Will you tell me a better word if you have one? Is the word "lodge"——

A. This translation, which I didn't see before, just follows the words which I used: "One who has to give security may do so:—

by depositing money or papers of value,

by pledge of claims, which are entered in the Book of Debts of the Empire or in the State-Book of Debts of a Federal State,

by pledge of movable things,

(Testimony of E. O. F. Golm.)

by executing mortgages on land within the realm,

by pledge of claims secured by mortgage on land within the realm or by pledge of liens on land or of ground rents within the realm.

If security cannot be given in the manner indicated, an undertaking by a sufficient surety is admissible."

Q. Yes. [274]

A. This doesn't define the conception of what a surety is.

Q. By Mr. Hirschfeld: Is the claim of the judgment against Universal a commercial transaction?

A. No. Do you mean—may I ask what transaction you have in mind?

Q. Well, is the judgment itself a commercial transaction?

A. The judgment itself is a document.

Q. All right. The claim upon which the judgment is based, is that a commercial transaction? [275]

Q. By Mr. Hirschfeld: Mandl is entitled to only four [276] per cent. Is that what you said?

A. No. What I testified to is this: Assuming the fact to be true, that by virtue of law—I was asked this question: There was a transfer of this claim and this judgment from the Bank for Foreign Commerce to Mandl; assuming this fact to be true, to what interest would Mandl be entitled.

(Testimony of E. O. F. Golm.)

Q. Entitled to receive from whom, from Universal?

A. From the person which he is suing in order to seek satisfaction out of this claim. The debtor of this claim.

Q. That is Universal?

A. Universal, in this case.

Q. In the hypothetical case?

A. Yes. And I answered the question that, first, a transfer of law, if it is possible, which I have to assume in this case, could only be made to this extent: If he satisfies the creditor, the Bank for Foreign Commerce, only in so far as the claim of the Bank for Foreign Commerce could be transferred to him, that he is not entitled to the same interest which the Bank for Foreign Commerce would have been entitled to demand, but that he is only entitled to the legal interest if there is no expression to the agreement between the debtor and the other party. I base this opinion, which is my juridicial opinion, also on the decision of our highest court, printed in Volume 61, where this case is decided. [277]

Q. But in this case, Doctor, have you read the judgment? A. I have it here.

Q. No. The judgment in the case against Universal. A. Yes.

Q. And you have read the judgment rendered in the—— A. I translated it.

(Testimony of E. O. F. Golm.)

Q. ——in the Reichsgericht. Did you observe that in that judgment the interest was specified at two per cent above the Reichsbank discount rate? A. Yes, I observed it.

Q. By Mr. Hirschfeld: In the event this court were to require the defendant here to pay to the plaintiff here that judgment, do you agree that the interest that should be charged is the interest that is shown in the judgment?

A. In the event that this court should agree that Universal has to pay this judgment—that is quite another question, which I am asked now. In the event, for instance, that this court for any reason should agree that Universal has to pay this judgment——

The Court: What would be the interest they are entitled to?

A. Then the interest at the rate set forth in the judgment. But that is another question. [278]

The Court: I know. That is the question he is trying to find out.

Q. By Mr. Hirschfeld: In any event, Doctor, is not the transaction between the Bank and Mandl a commercial transaction?

A. Which transaction between the Bank and Mandl?

Q. The one you have read about in Exhibit 5.

A. This notice only says that Mandl undertakes a suretyship in this case. In this case the word "burgschaft", which means suretyship, is chosen.

(Testimony of E. O. F. Golm.)

The Court: Assuming that that claim sets forth, further, an obligation of Mandl, also; Is it a commercial transaction?

A. It doesn't appear from this, because it doesn't appear that Mandl undertook the suretyship, because it belonged to a mercantile trade.

The Court: Is it for an accommodation?

A. He says he was related to Mr. May and had business. This could be a private affair. But I don't know what Mr. Mandl did. A commercial transaction can only take place in the frame of a certain business, if the person is a mercantile trader.

The Court: In other words, going security for someone else at a bank, where there is nothing to show that it was connected at all with the business of Mr. Mandl, who was the surety, would not constitute a commercial transaction?

A. No. We must know more facts about it.

[279]

The Court: All right.

Q. By Mr. Hirschfeld: The fact that it was a business transaction with the Bank would not entitle it to be a commercial transaction?

A. Would not suffice to arrive at that conclusion.

Q. If the court construed the transaction to be a commercial transaction, then the interest rate would be as set forth in Sections 352 and 353 of the Commercial Code; is that not so?

(Testimony of E. O. F. Golm.)

Mr. Selvin: You mean if it is construed as a commercial transaction under the German law?

Mr. Hirschfeld: Yes.

A. The interest which Mandl could claim from Universal?

Q. By Mr. Hirschfeld: No. You testified yesterday that Mandl's claim on the suretyship arrangement was limited to four per cent; is that right?

A. I testified that, assuming that by virtue of law it was a transfer of the claim of the Bank to Mandl——

Q. Yes.

A. ——then he would be entitled to claim four per cent in case of default.

Q. From whom? A. From his debtor.

Q. Who, in your hypothetical case? Name him.

A. The same debtor against the claim of the Bank.

The Court: Universal? [280]

A. That must not necessarily be Universal. It could be Joe May, too, because he is entitled to claim contribution from Joe May. It could also be the May Film, because he is entitled to, if he satisfies the creditor, to have regress to the main debtor and to another guarantor.

Q. By Mr. Hirschfeld: In the hypothetical case, you mean, that Mr. Mandl might claim the full interest that is in the judgment as against Universal, but as against Mr. May or maybe against

(Testimony of E. O. F. Golm.)

the May Film Company he could only claim four per cent; is that correct? A. No.

Q. Under your hypothetical case, as you limit it?

A. Under the hypothetical case, that by virtue of law the claim belonging to the Bank and to the extent to which Mandl satisfies the Bank—which is to be borne in mind—has been transferred to Mandl, then he could claim this part only which he had paid and only interest of four per cent, because he could not seek satisfaction out of a security to a higher degree than his claim is valid. He acquires the claim only in so far as he satisfies the Bank. That is set forth in Section 774.

Q. Then, do you mean that if Mr. Mandl only paid 20,000 marks, for example, to the Bank fuer Auswaertigen Handel and received, by operation of law, these pledged articles, that he could make claim against Universal only for 20,000 marks plus four per cent interest? [281]

A. There is no doubt about that. I am completely sure. If Mr. Mandl—assuming the fact the debt was higher, of 80,000 Reichsmarks, as was stated here, and Mr. Mandl paid the remaining balance of 20,000 marks, then the claim belonging to the Bank was transferred, to him, by virtue of law, only to the amount of 20,000 marks, and his right to seek satisfaction out of any security—whether it was a stamp collection, whether it was a suretyship, whether it was real estate, whatever

(Testimony of E. O. F. Golm.)

it was—was limited by the amount to which he had acquired the claim. He could never ask for more than he was entitled to demand.

Q. If the claim is assigned to Mandl, by operation of law, against Universal, and assume the claim against Universal is for 100,000 marks, and assume that Mandl has only paid out the interest, as you figure it, 20,000 marks, then, if I understand you correctly, you say that Mr. Mandl may only take 20,000 marks?

Mr. Selvin: From Universal.

A. I don't say; the law says, completely and without any doubt. Section 774.

Q. By Mr. Hirschfeld: What happens to the other 80,000 marks; is that a present or profit to Universal?

A. Universal owes a debt, arising out of this judgment, to somebody, but not necessarily to a man who has only acquired part of this claim by operation of law.

The Court: They would still owe it to the judgment [282] creditor?

A. To the judgment creditor.

The Court: They would owe it to the original judgment creditor, to May Film.

A. Of course. And the Bank for Foreign Commerce has to assign it, if necessary.

Q. By Mr. Hirschfeld: Under German law Mr. Mandl has this: We will assume that by operation of law he owns this judgment against Universal,

(Testimony of E. O. F. Golm.)

and he wishes to go on this judgment. He has the right, under German law, to decide which of these various securities he will go after, does he not?

A. He has the right, yes. There might be a restriction, but he can assume he has the right, in general cases.

Q. It is true, is it not, Universal can say, "You must go after the jewelry first"?

A. Not necessarily.

Q. He can say "I am going after you first"?

A. Yes.

Q. So when he comes after Universal, in our hypothetical case, and he brings a suit, under the German law must he limit his demand in the suit to just how much he paid?

A. This is, without any doubt, to be answered in the affirmative. He has to say the following—he has to say to the court, to the German court, in this case: "I assumed responsibility"—let's say a suretyship—"toward the [283] Bank. Out of the suretyship I paid 20,000 Reichsmarks. Therefore, to the amount of 20,000 Reichsmarks, and with the restriction that it may not avail to the detriment of the Bank, I am now entitled to seek satisfaction out of this claim given as security to the Bank and, therefore, I ask 'May it please the court to condemn the debtor of this claim to pay to me the amount which I have paid.' "

(Testimony of E. O. F. Golm.)

That means 20,000 marks with interest at the rate of four per cent.

The Witness: It is clear provision of the German law which can't be disputed by anybody.

Q. By Mr. Hirschfeld: Since, under your interpretation, he is limited to asking only, in our hypothetical case, for 20,000 marks, and he, by operation of law, is the owner of the claim, how does the Bank, as you have said, get the balance of the claim for itself?

A. The question contains a contradictio in adjecto, a [284] contradiction in its incorporation. Mr. Hirschfeld wants me to assume to be true that Mr. Mandl only paid 20,000 marks, but by virtue of law he acquired the claim to its full extent, which he did not. If he only paid 20,000 marks he acquired the claim only to that extent.

The Court: And the remainder of the claim is still in the judgment creditor?

A. Or the Bank.

The Court: And they could pursue whatever remedies they have to enforce it?

A. And they have the preference, as set forth in sentence two of this section.

Q. By Mr. Hirschfeld: If the Bank held as security this judgment, and Mr. Mandl, in our hypothetical case, only gets the right to, we will say, one-quarter of this judgment, and assume that the Bank got the judgment from Mr. May origi-

(Testimony of E. O. F. Golm.)

nally, and assume that the Bank is fully paid and has no more claim, is it not a fact that the Bank no longer holds the balance of the judgment?

A. The fact is that Universal owes the full amount, but it doesn't owe the full amount to the paying surety who only pays a part of it. And to whom he owes the other amount is a question of fact.

Q. I am talking about not who owes, but who owns. Who is the owner where the Bank is paid in full, let us say, and May Film pays a part, Joe May pays a part and Mrs. May pays [285] a part, and the last is paid by Mr. Mandl.

A. Yes.

Q. Each one in turn would receive a certain interest in this claim?

A. I understand the question.

Q. Since Mr. Mandl only receives part of the claim and since Mr. May, under our hypothetical case, would receive a part of the claim, do not these parts of the claim transfer from the Bank to the different people, by operation of law?

A. This depends on the legal position which these different people had, as to whether they bear suretyship or as to whether they are third persons who pay an obligation. If a third person pays an obligation of another person that third person does not acquire the claim. Only a suretyship acquires it. Let us assume that the debtor

(Testimony of E. O. F. Golm.)

paid 80,000 marks—I mean the debtor of the Bank paid 80,000 marks, and the rest was paid by the suretyship. Then the Bank was under the obligation to reassign 80,000 marks to the debtor and 20,000 marks to the suretyship.

Q. And therefore, in Germany——

A. I tried to make this clear.

Q. I think it is clear now, Doctor. Therefore, in Germany, where there was one claim held by one person—we will call it one hundred per cent—it may be broken up so that five people may each own a fraction of it, and the defendant may have to pay five different people? [286]

A. That is not the regular case, but such a situation can, under certain circumstances to be assumed to be true, arise.

Q. Assume that Mr. Mandl, in fact, paid more than the amount of the judgment to the Bank; then what is his position?

A. Assuming that Mr. Mandl paid more than the amount of the judgment, but he paid as a suretyship and he paid the debt of the main debtor of the Bank—that has to be added, otherwise I can't answer this question——

A. ——in this case he would acquire the claim of the Bank, amounting to more than the claim against Universal given as security. Therefore, of course, he would acquire the whole amount of the judgment.

(Testimony of E. O. F. Golm.)

The Court: And could recover from the judgment debtor the full amount and the balance?

A. It wouldn't be covered by security.

Mr. Selvin: That is, of course, if it passed to him.

The Court: Yes.

A. But that is only under the assumption that there was an operation of law. [287]

E. O. F. GOLM
(recalled)

Cross Examination
(resumed)

Mr. Hirschfeld: Read the last answer, Mr. Reporter.

A. The question is, if Mandl paid more than the amount of the judgment against Universal, then what was his position in this case? And I answered that if he paid more to the Bank than the claim against Universal amounted to, and if he paid this as surety—which has to be added—and in order to free the principal debtor—which has to be added, too—then, of course, he acquired the full claim against Universal. That is what I said. Then, I think your Honor said, "What became of the rest?" And I said, "This wasn't covered by the security." [288]

Q. By Mr. Hirschfeld: Is there any particular way, in our hypothetical case, that Mr. Mandl had to make payment to the Bank in order to meet the

(Testimony of E. O. F. Golm.)

qualification that you have made in your answer, to-wit, paid as surety?

A. I don't know whether Mr. Mandl was a surety. If it is assumed that Mr. Mandl was a surety, yes.

Q. Is there any particular procedure or method of making a payment that Mr. Mandl would have to follow in order to pay as a surety?

A. No. If Mr. Mandl was a surety and made a payment, then the conclusion would always be that he made the payment in his capacity as a surety.

Q. Yes. I believe you said, Doctor, that under the present hypothetical facts, as you have heard them, that if Universal paid Mandl it was protected against a claim by the Bank, by virtue of the notice of the Bank to Universal that they should pay Mandl.

A. By virtue of this letter, yes.

Q. They would be estopped—is that the word?—the Bank would be estopped to claim any further?

A. Is it an English word?

Q. I am sorry. I thought perhaps it would be familiar. Prevented?

A. Prevented from? Yes. I thought you meant a German word.

Q. Doctor, is there any difference in the operation of [289] the transfer by law, under Section 774 of the Code and similar sections applicable to the situation, where A puts up his own, we will say, claim as security for the claim that A owes to B,

(Testimony of E. O. F. Golm.)

and the situation where A owes to B, and C puts up his security for the payment of A's claim to B, and in both cases assume that B receives the assignment of the claim that is given as security?

A. I have to confess it is a little bit complicated.

Q. Suppose A owes B.

A. A owes B. B is the creditor and A is the principal debtor?

Q. Yes. And A owns a claim against a third party, X. A. All right.

Q. And in one case A puts up, as security for his indebtedness to B, the claim which A owns against X. A. Yes.

Q. You have the situation? A. Yes.

Q. Now, let us say that A owes B some money, but C owns a claim against X and C puts up, as security for A's debt, the claim against X?

A. Yes, I understand.

Q. Now, in the first case, if A pays B, B is obligated, under the law of Germany, to immediately return the claim to A that A gave him that he had against X; is that right?

A. In case it wasn't given as a pledge, but was really [290] assigned to the full extent, then he is under the obligation to reassign it.

Q. To reassign it?

A. Yes. To give it back, as you call it.

Q. Let's take the second case, where A owes to B, and C gives to B a claim against X. Must B

(Testimony of E. O. F. Golm.)

reassign the claim to C when C pays the bill or debt?

A. The question is very easy, now. It depends only upon the interpretation of the ascertainment of what was C's position. Was C a man who said, "I am liable for A's obligation and I, therefore, assume a suretyship"? Then, it is the case of provision 774. But if C was a third person who had another obligation, or even no obligation, but just wanted to be helpful in this matter, for one reason or another, and put up a security, then there was no transfer by virtue of law, because a third person, who puts up security without being a surety, does not belong to the persons which Section 774 has in mind.

Q. But let us say that in this case C has obligated himself, as a surety, for A's debts to B.

A. I think it is a real case of Section 774.

Q. Now, let us take a third situation, where A owes to B and where C and D are sureties, and C puts up his claim against X, and D pays the claim.

[291]

A. Yes, it is clear to me with one restriction. You always say, "He puts up security".

Q. Yes, he puts it up as security.

A. In my opinion we have to distinguish whether he assigns it as security or puts up a pledge.

Q. Let us say he assigns it, under the understanding that is not disputed and is admitted, he

(Testimony of E. O. F. Golm.)

puts it up as security. Now, C puts up his security as a co-surety with D for the payment to B of A's debt. A. Yes.

Q. Now, instead of C paying to B, which is similar to what you said had to be a direct reassignment, D pays the obligation of C and himself; in other words, he pays both.

A. In other words, there are more than one surety?

Q. Yes, there are two sureties.

A. And one of the sureties pays a debt and the other surety gave the security?

Q. That is right.

A. There we have a special case which is provided for in Section 774, paragraph 2, and this section reads: "Co-sureties"——

Q. Will you just wait a minute until I get it, please? A. 774, paragraph 2.

Q. Go ahead now.

A. "Co-sureties are only"—this is to be emphasized, the word "only"—"Co-sureties are only liable toward each [292] other under Section 426." This means co-sureties, in the example which you gave me, D and C, as co-sureties, are joint debtors.

Q. Yes.

A. Which follows out of Section 769.

Q. Did you say that the co-sureties are liable to each other?

A. No, I didn't go over to Section 426 yet. I want to come to that part.

(Testimony of E. O. F. Golm.)

Q. But aren't those the words of 774?

A. "Co-sureties are only liable toward each other under Section 426." You cannot understand it without reading Section 426.

Q. But Section 426 deals with the liability of C to D and D to C, but does not deal with the obligation of B to reassign to D?

A. Oh, yes.

Q. It does?

A. Oh, yes; not directly, as it says, "Co-sureties are only liable toward each other under Section 426." And if you keep in mind what Section 769 says——

Q. Wait. Will you finish with 426?

A. This has to be connected here. Then Section 426 says that if they are joint debtors they are liable in their relation—I am quoting from my memory. Please correct me [293] if it isn't correct —are liable in their relation to each other, in equal parts. Section 774 provides for this case in your example, as follows: Since C and D are co-sureties and joint debtors in their relation to the creditor, but liable in equal parts in their relation to each other, it follows from this that a co-surety—in your case D, I think—who pays the whole amount can recover contribution in an equal part. That means to the half amount, from the other co-sureties. And in so far as a paying co-surety is entitled to claim contribution—what I am saying now follows again

(Testimony of E. O. F. Golm.)

out of Section 426 in connection with 401—in so far as a co-surety is entitled to claim contribution from another surety, to-wit, to an equal part, in so far as the securities put up by another surety are transferred by operation of law to him.

Q. By Mr. Hirschfeld: Thank you. That is very fine. Doctor, will you please examine Section 398?

Q. May we have your translation, please? [294]

A. "A claim may be assigned by the creditor, by agreement with another person to the latter (cession). From the conclusion of the agreement the new creditor (assignee) takes the place of the former creditor."

Q. By Mr. Hirschfeld: The statement I have here, Doctor, is: "A claim may, by contract with another person, be transferred by the creditor to him (i. e., assignment). On the conclusion of the contract the assignee takes the place of the assignor."

A. I can't see any essential difference.

Q. Thank you. Does the translation that you have have notes?

A. No—yes, it has some.

Q. Is there a note, that is correctly a part of the law, to the effect that the contract of assignment may be either verbal or in writing?

A. It has no note, as far as commenting on the text. It only refers to other—for instance, the Spanish law.

(Testimony of E. O. F. Golm.)

Q. By Mr. Hirschfeld: With respect to Section 399?

A. Section 399 says, "A claim cannot be assigned, if the [295] preference to another than the original creditor cannot be rendered without change of its nature, or if the assignment is excluded by agreement with the debtor." Do you want me to explain it?

Q. No. That is a correct statement of German law? A. Yes, surely.

Q. And 400?

A. Section 400, "A claim cannot be assigned, in so far as it is not subject to attachment."

Q. And next, Section 401. I want to get to 410.

A. Section 401: "With the assigned claim, the mortgages or liens, belonging to it, as well as the right arising out of a security given for it are transferred to the assignee.

"The assignee can also claim a right of precedence pertaining thereto, in case of the levy of execution or in case of insolvency."

Q. Do you possibly agree that that statement is correct?

A. Section 401, paragraph 1, is correctly translated.

Q. Is this also correct, Doctor: "With the assigned claim the rights of hypotheca or pledge existing on its account and the rights arising from a suretyship established for it, pass to the assignee"?

(Testimony of E. O. F. Golm.)

A. No, that is not correct, because Section 401, in the German wording, doesn't speak about—oh, yes, that is right. It speaks about a suretyship.

Q. Thank you. Does it also state substantially that [296] the assignee may enforce any right of preference connected with the claim in case of compulsory execution or bankruptcy?

A. You are referring to paragraph 2 of 401?

Q. Yes. A. Yes, that is right.

Q. Will you say that Section 402 is substantially correct in the following words: "The assignor is bound to give to the assignee all information necessary for the enforcement of the claim, and to deliver to him all documents which serve as evidence of the claim, if they are in his possession"?

A. That is the provision I was referring to several times.

Q. Yes.

A. "The former debtor upon demand has to execute to the assignee a publicly authenticated instrument of assignment. The assignee has to bear and advance the costs."

Section 404: "The debtor may avail himself as against [297] the assignee of the defenses, which at the time of the assignment of the claim were good as against the former creditor."

Q. By Mr. Hirschfeld: Section 404, in your opinion, that limits any of the debtor's defenses under an assignment to those that existed as of the

(Testimony of E. O. F. Golm.)

time of the assignment of the original claim; is that not correct?

A. Yes, it limits it and explains it.

Q. By Mr. Hirschfeld: Please read your translation of Sections 406, 407, 409 and 410.

A. Section 406. "The debtor may set up against the assignee a claim due to him from the former creditor, unless he knew of the assignment at the time when he acquired the claim, or unless the claim did not become due until after [298] such knowledge and after the assigned claim became due."

Q. In your opinion does this apply to attachment as a set-off?

A. Yes, this applies to an attachment.

Q. Yes.

A. Well, there is no set-off. You can't set off against an attachment. I don't know what you mean.

Q. Isn't an attachment a set-off under German law?

A. Set-off is quite another thing from an attachment.

Q. Thank you. Will you now give us Section 407?

A. "The assignee must allow against himself a performance, which the debtor renders after the assignment to the former creditor as well as every transaction, which takes place after the assignment between the debtor and the former creditor regarding the claim, unless the debtor has knowledge of

(Testimony of E. O. F. Golm.)

the assignment at the time of the performance or of the transaction."

Q. Is the word "Justice act" equally good there instead of transaction"?

A. I would prefer the word "transaction", because the German word is "Rechtsgeschaft", a legal transaction.

Q. Is an attachment a legal transaction?

A. Yes, attachment is a legal transaction. [299]

Q. Within the meaning of this code section?

A. No—well, there is a dispute about the words. It is a legal transaction in the meaning of this wording—Rechtsgeschaft, section 116—a voluntary transaction and not an attachment executed by force of state.

Q. A person, however, who gets the Amtsgericht to issue an attachment is doing a voluntary act; is that not true?

A. Yes, but not in the meaning of this section.

Q. Will you read the second part of the section or give us your translation?

A. "If in a lawsuit instituted between the debtor and the former creditor after the assignment, a final judgment has been rendered concerning the claim, the new creditor must allow the judgment against himself, unless the debtor knew of the assignment at the time of the commencement of the suit."

Q. Section 408?

A. "If an assigned claim is again assigned by the last creditor to a third party and if the debtor performs toward the said party, or if between the

(Testimony of E. O. F. Golm.)

debtor and the third party a transaction is entered into or a legal controversy is instituted, the provisions of Section 407 are correspondingly applicable in favor of the debtor as against the former creditor.

"The same is applicable, if the already assigned claim is by judgment adjudicated to a third party, or if the [300] previous creditor acknowledges to the third party, that the already assigned claim has by virtue of law been transferred to the third party."

Q. Would you take your German code and tell us, please, if the following is not substantially correct, as to the second paragraph?

A. Just a minute. I don't have it.

Q. Have you found 408? A. Yes.

Q. Is this substantially correct: "The same rule applies if the assigned claim is reassigned to a third party by judicial order, or if the assignor makes acknowledgment to the third party that the assigned claim is transferred to the third party by operation of law"?

A. I would only object to the word "reassigned" in the first part. I wouldn't say "reassigned." I would say "transfer", or maybe the better word, as it is used here, "adjudicated", but not "reassigned".

Q. What is the word in English, please?

A. Adjudicated.

(Testimony of E. O. F. Golm.)

Q. Adjudicated? A. Yes.

Q. Does that, in your opinion, mean only by an order of court?

A. Not only, but in this connection it means by an order of court. It says, "by jdugment adjudicated". [301]

Q. But the second part of that sentence is all right? A. As you read it to me?

Q. Yes. A. Yes.

Q. Section 409?

A. Do you want me to read it?

Q. Please; your translation of it.

A. "If the creditor informs the debtor that he has assigned the claim, the notice of assignment is valid against him, as towards the debtor, even though the assignment had not been made or is not effective. It is equivalent to the notice, that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter presents it to the debtor.

"The notice can be withdrawn only with the assent of the party, who is named as the new creditor."

Q. Referring to the first sentence, Doctor, is this substantially a correct translation of the German law, in your opinion: "If the creditor notifies the debtor that he has assigned the claim, the assignment of which he has given notice avails against himself in favor of the debtor, even though it was not made or is invalid"?

(Testimony of E. O. F. Golm.)

A. I can't see any essential difference.

Q. Thank you. Section 410?

A. "The debtor is obliged to perform to the new creditor only upon delivery of the instrument of assignment executed [302] by the former creditor. Demand or monition of the new creditor is ineffective, if it is made without presentation of such instrument and if the debtor immediately refuses the same on this ground.

"These provisions have no application, if the former creditor has notified the debtor in writing of the assignment."

Q. Would you say, Doctor, that the following is a substantially correct statement of the German law as to Section 410: "The debtor is bound to perform in favor of the assignee only upon production of an instrument of assignment executed by the assignor. A notice or a warning by the assignee is of no effect, if it is given without production of such an instrument, and the debtor without delay rejects it for this reason.

"These provisions do not apply if the assignor has given written notice of the assignment to the debtor"?

A. Well, I can't see at the moment that there is a substantial difference between this text and the text I read. [303]

Q. By Mr. Hirschfeld: Is it true that under the translation the provisions of Sections 399 to 404, which you just read, and the provisions of 406 to

(Testimony of E. O. F. Golm.)

410, apply to the transfer of a claim by operation of law?

A. Yes, because it is a special provision.

Q. You don't have to explain your answer. I would like to make this shorter, if I may.

The Court: No; you are depriving the witness, as an expert, from giving his reasons.

Mr. Hirschfeld: Very well.

The Court: Give the reason, Doctor.

A. The reason is that there is a special provision in our code which says that as to transfer of a claim, by operation of law, the provisions just quoted—other provisions are excepted—are applicable.

Q. By Mr. Hirschfeld: That is because of Section 412, is it not? A. Yes.

Q. Doctor, is it not also a fact that under the German law that if a third party satisfies a claim of the creditor the claim is transferred to him——

[305]

The Court: He has answered that this morning.

Q. By Dr. Hirschfeld: ——if the transfer can be effected without hurting the creditor under a general section of the law? That is not dependent upon either suretyship or guaranty, but under Section 268, which is not concerned with either of these situations?

A. I know the Section 268. I know what you have in mind. In my opinion, which is the opinion of the German Supreme Court, too——

(Testimony of E. O. F. Golm.)

A. ——a third person who satisfies a creditor, without being a surety or without being a joint debtor or a person to whom special provisions are applicable, does not acquire the claim by operation of law.

The Court: You answered that this morning in the same manner? A. Yes.

The Court: He is a volunteer, in other words?

A. Yes.

The Court: And is not given any protection of the law, at all?

A. Yes. It isn't a contract.

The Court: There is no relationship; no judicial relationship by which any rights or duties are disposed; is that right?

A. That is correct, your Honor. [306]

Q. By Mr. Hirschfeld: In what manner, under Section 268, is a claim transferred to a mere volunteer, if that is your interpretation of 268?

A. This Section 268 is a special provision in the meaning which I just used. I said, "If there wasn't a special provision, as in the case of a surety or a joint debtor." This is a special provision which applies to a case of compulsory execution and it deals with the case where a creditor levies an execution onto an object which might be the property of a third person, or which is attached by a third person or in which a third person has a legal interest. That is what Section 268, paragraph 1, says. And

(Testimony of E. O. F. Golm.)

then it gives a special right to these third persons, in order to protect his own right to satisfy the creditor; and it provides, furthermore, that in this case only a transfer by virtue of law takes place. It is quite another case.

Q. Thank you. Now, Doctor, is it not a fact that under German law an arrangement of suretyship or an arrangement of guaranty is a contract within the meaning of the law? A. Surely.

Q. And is it not a fact that all contracts in Germany [307] shall be interpreted according to the requirements of good faith, ordinary usage and business usage being taken into consideration?

A. That is what I was trying always to point out.

Q. The answer is yes, isn't it?

A. The answer is yes.

Q. Is it not also the law of Germany that the debtor is bound to execute a performance according to the requirements of good faith?

A. You are quoting Section 242?

Q. That is right. A. That is the law.

Q. Ordinary usage being taken into consideration? A. Yes.

Q. Ordinary usage? A. Yes.

Q. Doctor, I believe you said that Section 765 is the only definition, or is the correct definition of a surety? A. In the meaning of this law.

Q. In Germany?

A. Yes; 765. Let me compare it. Yes, Section 765 gives the definition of what is a suretyship.

(Testimony of E. O. F. Golm.)

Q. Now, Doctor, if two people each guarantee and are good as a surety, within the meaning of the word, as you have used it, on one obligation, but they have not done it together, either relying upon the other, is it not a fact [308] that under the law they are liable as joint debtors, even though they have not assumed a suretyship in common, as understood in the law?

A. I just quoted this section two minutes ago.

Q. Section 769? A. Yes.

Q. That is correct? A. That is correct.

Q. Thank you. And it is true that a suretyship may exist for a money claim alone—do I make my question clear, Doctor,—and there was some discussion here as to a distinction between a guaranty and a suretyship, in which a warranty of performance and success was distinguished purely from an agreement to pay money; and I now ask you if it isn't a fact that under the German law there can be a suretyship only for a money claim?

A. There can be a suretyship not only for a money claim, but I would go a step farther and say that is the usual case of a suretyship; that somebody assumes the liability that another person pays a money claim. That is the ordinary type of suretyship.

Q. That is covered in Section 772, is it not? That is the section that makes that point?

A. The first sentence of Section 772 says, "If there is a suretyship concerning a money claim,"

(Testimony of E. O. F. Golm.)

and it goes on with what has to be done in this case in order to levy an [309] execution.

Q. And finally you have discussed a situation where the pledgor—you have used the word "pledgor"? A. That is right.

Q. You mean that is different than a surety, now, do you?

Mr. Selvin: You mean a pledgor would be different? A. The man who pledges something.

Q. By Mr. Hirschfeld: He is not the same as a surety?

A. No, he is not the same as a surety. A surety is a burge. A pledgor is a verpfander.

Q. A pledgor is not the man who owes the money and he pays the money. Is it not true that whatever was pledged in the entire transaction passes to him when there has been a payment?

A. I can't answer this question generally. I must have more facts in order to answer this question. If, for instance, somebody pledges a movable thing—I don't know what you have in mind.

Q. Well, will you please refer to Section 1225 and explain the German law——

A. That is what I had in mind.

Q. ——with reference to a situation where the pledgor is not the person debtor, but nevertheless a claim passes to him when he satisfies the debt?

A. In this case there is a special provision that this [310] pledgor has to be treated as if he were

(Testimony of E. O. F. Golm.)

a surety. Section 1225 says that in this case and under these premises the provisions given in Section 774, and applicable to a surety, are correspondingly applicable to the pledgor.

Q. Thank you.

A. But—excuse me—I am not quite sure whether this section is only applicable in case of pledging a corporeal thing, or also of pledging a right, because a later section which deals—this section is under the caption "Pledge on things"—on corporeal things, which is quite different from a right. And later on follows another title, another book, which I find, which deals with pledging of rights. And I am just looking up to see whether this section is correspondingly applicable in this case.

Q. You mean 1273?

A. 1273, paragraph 2, says that these provisions are correspondingly applicable in so far as it isn't otherwise provided by law. Now, of course, as far as I see there is no other provision. So, then, it would be applicable, too.

Q. Thank you. Is it not also German law that where there is a transfer of the claim, where there has been a pledge of movables, as you referred to it, that the pledge passes to the transferee and that the pledge cannot be transferred without the claim?

A. If I understand you right you refer to this Section [311] 1225, and it says that the same rules are applicable as in the case of a surety.

Q. Referring to 774? A. 774.

(Testimony of E. O. F. Golm.)

Q. Thank you. Now, you have made a distinction as to the difference between movables and a claim or a right? A. That is right.

Q. But isn't it a fact that under German law the claim of a pledge or a right is effected according to the provisions applicable to the transfer of rights, and that if, for the transfer of the right, the delivery of something is necessary, that the provisions of 1205 and 1206 do apply?

A. I think that is the question you asked me this morning, what is necessary to pledge a right, and if it is done by way of assignment. But if this assignment is an assignment only—in using the German word "abtretung"—without making any implication that it isn't an assignment to its full extent, it wouldn't be considered as a pledge; it would be an assignment; and the Section 398 and following, which we just read, are applicable.

Q. Would you not have to refer to Sections 1274 to 1296 to see if a contrary intention was not desired? A. Which section, please?

Q. 1274 to 1296.

A. Section 1274 says what I just said, that a pledge as to a right is made by assignment. I don't know what I [312] have to add.

The Court: You explained that yesterday. You said a pledge as to a thing, it must be delivered.

A. Yes. If it is a corporeal thing he has to deliver it, and as this section also speaks about the

(Testimony of E. O. F. Golm.)

delivery of a thing, then, for instance, it applies to the example you asked me this morning, for example, how can I pledge a story. And I said you have to pledge the copyright and to deliver the story.

Q. By Mr. Hirschfeld: Doctor, did you testify as to the rights of a director of a corporation to sell assets?

A. You mean a member of the governing body?

Q. Yes.

A. I was asked several questions in this case and I testified——

Q. By Mr. Hirschfeld: Yes. You will recall that his Honor the court questioned you with respect to rules and reasons that existed where there were creditors. A. Oh, yes, I recall.

Q. And without going into your answers at great length I would like to ask you generally if the general rules of German law, designed for the protection of creditors, were in your mind at the time you made answer to what has to be [313] done in the question of selling an asset? You were thinking of creditors, were you not?

A. His Honor the court asked me whether it is permissible that the governing body transfer the assets of a company without the assent of the creditors. I think that was the question.

Q. Yes.

A. As far as I recall I answered that a transfer of assets made under such circumstances may be

(Testimony of E. O. F. Golm.)

valid, but our law knows the conception of a so-called relative invalidity, if that is the correct English word—relatively invalid. And this applies to the case when a governing body transfers assets to the detriment of the creditors, and the creditors, therefore, are entitled to challenge—I think I used the German word "anfechten"—that transaction.

Q. Is that based on Section 303 of the Civil Code —of the Commercial Code?

A. I have to confess that I dont' know, from my memory.

Q. I am sorry, Doctor. I thought that was——

A. Which one?

Q. 303.

A. That is a special section which says that a transfer of the property, of all the assets of a stock company in the whole, is not permissible without the consent of a meeting of the members. But this wasn't the question which I had to answer yesterday. [314]

Q. But it is true that the corporation may sell all of its assets without the consent of the creditors; isn't that so?

A. It may be without or with consent. It is quite another question whether it is valid against the creditors.

Q. Well, is it not a fact that if a corporation sells all of its assets this acts as a dissolution of the corporation? A. As a dissolution?

(Testimony of E. O. F. Golm.)

Q. Yes. A. It must be.

Q. Isn't that what Section 303 provides, that if all the assets are sold that that is the effect?

A. Yes.

Q. If it has been done by an authorized resolution, that is, if the sale has been authorized, the effect of the resolution is to dissolve the company?

A. Yes, but you asked me if a corporation sells all of its assets.

Q. Yes.

A. It is different whether a corporation sells all of its assets or whether the corporation sells its property in the whole. If you could read German you would see the words "vermogens im ganzen". But, of course, this has the consequence that the corporation has to be dissolved.

Q. I am not concerning ourselves now, Doctor, with whether or not the corporation must turn over to the [315] creditors the money that it gets when it sells all of its assets. What I am concerned with, it is a fact that if the corporation desires to sell all of its assets it may do so without the consent of the creditors, as provided by Section 303?

A. Yes.

Q. That is right. And it is also right that if they do this by a resolution it has an automatic effect of dissolving the corporation; isn't that so—the second paragraph?

A. Yes, that is right. Then you start your liquidation.

(Testimony of E. O. F. Golm.)

Q. Yes.

A. Then you start your liquidation.

Q. In the case that we have been discussing here you have been shown, have you not, a resolution to sell a certain asset? A. Not an asset.

Mr. Hirschfeld: I will withdraw the question.

Q. We were discussing the sale, by a corporation, of one particular asset.

A. Excuse me; we were not discussing this.

Q. Well, were we discussing a transaction by which Joe May acquired the claim against Universal by virtue of the resolution of the board, consisting of one person, Miss [316] Loewenstein?

Mr. Hirschfeld: Well, we will call it a statement of the board or signature of the board.

The Court: What the record shows is an agreement of two stockholders to a division of assets and a later assent of the sole director to the arrangement.

The Witness: It was an agreement between Aussenberg and Joe May. And the claim against Universal is not mentioned in this agreement, but by interpretation of Miss Loewenstein it is included in this agreement in the claims which are not very sure—dubious.

Q. By Mr. Hirschfeld: As a matter of German law, where there is sort of a blanket consent given that does not mention anything specifically, the person who signs it can control the effect of that docu-

(Testimony of E. O. F. Golm.)

ment by stating the intent at the time it was executed? The intent of what was in the mind of the [317] person who made it is what rules where it isn't clear; is that not so?

A. Yes; the meaning of the interpretation—I don't know. I am confused.

A. This answer is not clear. As a means of interpretation in the case where a contract or another transaction is ambiguous, the intention of the person, what he had in mind, [318] may be used.

The Court: If the contract is clear as to its meaning——

A. No interpretation is necessary.

The Court: ——no interpretation is needed?

A. No interpretation is necessary.

The Court: Because, then, you would interpolate or intend something that may be absent?

A. Therefore, I didn't want to leave my answer——

The Court: That is a general rule of statutory interpretation that obtains in almost every country.

A. The gentleman asked me this morning if a contract is clear or another document is clear, or somebody says, "We have interpreted this in another way." This would never be sufficient under our law.

The Court: All right.

Q. By Mr. Hirschfeld: Doctor, it is the policy, also, of the German law, is it not, to try to give

(Testimony of E. O. F. Golm.)

effect to a document to make it valid, rather than interpret it so it will not be valid?

A. That is the general intention of the German law that applies to wills, of course——

Q. Only to wills?

A. ——but not to any document whatsoever.

Q. Well, maybe you don't understand me. I understood you to say, according to Section 157——

A. It is something quite different. It says that for [319] the interpretation good faith and——

Q. And ordinary business usage?

A. And ordinary usage has to be used as a means of interpretation; but it doesn't say in order to maintain a document, rather than to make it void.

Q. Yes.

A. Just the use of good faith, in German cases, can lead to the result that such a contract has to be considered void, following good faith. [320]

Q. By Mr. Hirschfeld: If a corporation has a certain asset is there anything in the German law that prohibits that corporation from selling that asset to a member of its board, if there are no creditors? A. To a member of its board?

Q. To a member of the corporation, and if there are no creditors and if the man who receives it pays full value for it?

A. There is no prohibition in the German law to sell—if I may repeat it, to make sure I understood your question.

(Testimony of E. O. F. Golm.)

Q. Yes.

A. ——to sell an asset belonging to the corporation to one of the stockholders, by a legal transaction, of course, executed by the governing body.

Q. If such a sale is made and the document that is executed under the circumstances is in the form that you have examined in the deposition of Johanna Loewenstein— [323] I think you have looked at it.

A. I would like to look at it.

Q. Yes. You have testified to it.

Mr. Selvin: It isn't in her deposition. It is in the record of that declaratory judgment.

Mr. Hirschfeld: Yes.

The Witness: You want me to look in the judgment; this declaratory judgment?

Mr. Hirschfeld: Yes.

The Witness: Which quotes from the deposition of Johanna Loewenstein?

Mr. Selvin: I think it is contained in either the complaint or the brief of counsel, as a matter of fact.

Mr. Hirschfeld: It is Plaintiffs' Exhibit 3.

Mr. Selvin: If you are referring to what I called to his attention on direct examination, it is this quotation on page 181 and this on page 184, which I think are exhibits to the complaint in the case in which plaintiffs' Exhibit 3 is the record.

Q. By Mr. Hirschfeld: Will you examine this again, please?

(Testimony of E. O. F. Golm.)

A. Well, I know now what it is. This is a part of the agreement between Mr. May and Mr. Aussenberg, and this is the balance sheet bearing the signature of Miss Johanna Loewenstein.

Q. Yes. Under such a transaction, if it is shown that [324] there were no creditors existing at this time and if it is shown that Mr. May, in this hypothetical question you answered, paid full value for the asset, and that at the same time the asset of the claim was an adverse judgment, and assuming further that Miss Loewenstein said that her intention—well, I will withdraw that part. The court doesn't want that in. Do you know of anything in German law that would prevent this from becoming a valid transfer?

A. I am perfectly willing to stand by the answer which I gave yesterday. This is not a transfer, in my opinion. It has another meaning and is an agreement between the two persons named, that certain assets should pass to them. And these assets, which, by the way, are not named, may also appear in this interim balance sheet; and the fact alone that this interim balance sheet has been signed by the then only member of the governing body is, in my opinion, not a legal transfer, of this claim in question, to the stockholder. And the question which you kindlly wanted me to assume to be true, as to whether there are creditors, or not, existing at this moment, would prevent this agreement to be a real transaction, is not important,

(Testimony of E. O. F. Golm.)

because in itself it does not constitute a transfer. It means, in my opinion, that the proceeds of these assets should, in the relation between Aussenberg and May, and maybe also in the relation to the corporation, if they were to be recovered at this time, at the time the law suit was lost in the first instance, would [325] be his benefit.

Q. You mean belong to him?

A. Not belong to him, but have to be transferred to him. But it was only an obligation between Aussenberg and May, that Aussenberg said, "I am no longer interested in these assets and whatever will come out of them that might be yours. You are the only stockholder." That is quite another thing.

Q. But suppose the corporation delivered these assets at that time to Mr. May, then this, according to your statement of German law, completes the transaction then and there, does it not?

A. The delivery of the assets could take place if these assets were jewels or stamp collections or other things that could be bodily transferred. If it was a claim that was in question, a real assignment by the governing body had to be executed that would replace the delivery, or would be the proper delivery in that case.

Q. By Mr. Hirschfeld: Where there is only one director of a corporation is not an oral assignment good?

A. An oral assignment could be sufficient if it was a [326] real assignment.

(Testimony of E. O. F. Golm.)

Q. Well, why do you qualify that?

A. Because I don't know whether you want me to interpret this as an oral assignment.

Q. I don't ask you to interpret this document as an oral assignment. I am questioning as to the law. If, at the time this was done, an oral assignment was made simultaneously as a part of this transaction, that would be good, would it not?

A. Under these circumstances—may I name the governing body by name—Miss Loewenstein should say, in executing this agreement, "To which I assent, I herewith assign the claim against Universal, in my capacity as the only member of the governing body, to you, Joe May." This would be a real assignment and it isn't necessary that it be written. The question whether it should be written usually is another one.

Q. But where there is just one person who owns all the stock and just one person who is a director, is it necessary, under German law, that these very technical legal words that you have quoted, be used? Would not simple words that a director, not a lawyer, intending that, "Now, this is yours," be good enough?

A. I think the words I used are simple, that "I assign you this claim."

Q. He does not have to use the word "assign", does he? [327]

A. He may use another one, but I don't know any other one.

(Testimony of E. O. F. Golm.)

Q. By Mr. Hirschfeld: If it appears from the balance sheet that the money was paid, is this circumstance, together with the fact that the claim is eliminated from the balance sheet——

A. I can't see that it is eliminated from the balance sheet, because it isn't mentioned.

Q. You don't see it in the balance sheet, do you?

A. I don't see anything in the balance sheet, only the usual balance, assets and liabilities.

Q. Will you please answer this question, though, without telling me other things?

A. I will try to. [328]

Q. You don't see that it is in the balance sheet, do you? This claim is not included in the assets?

A. No. No asset is mentioned.

Q. And according to the balance sheet 45,000 marks was paid; is that right?

A. This balance sheet mentions as assets——

Q. Upon an examination of that balance sheet, according to the interpretation of German law is it not apparent that there isn't included therein, as an asset of the corporation, any claim against Universal Pictures Corporation?

A. I can answer only this: There doesn't appear the payment that you asked me before.

Q. By Mr. Hirschfeld: No. Just one question at a time, because your counsel may want to object to each one. So confine your answer to my last question alone, if you can [329] answer it.

(Testimony of E. O. F. Golm.)

A. I thought your question consisted of two parts.

Q. No.

A. If you only want me to answer the last part, I may say that this balance sheet does not say that there was a claim against Universal, nor there was another claim, nor any claim.

Q. Does this balance sheet, under German law and as interpreted by your courts, indicate whether or not there was 45,000 marks in cash on hand on this date?

A. It doesn't say "In cash on hand." It says it is capital in shares, consisting of 45,000 marks. The capital of a stockholder company is never an asset. It is always a liability.

Q. Under the German method of showing these and the force and effect of these balance sheets, it does show the 45,000 marks as a credit?

A. As a capital in shares; in stocks.

Q. Will you tell us the force and effect of a balance sheet such as this? What is its legal effect under German law?

Q. You can confine your answer and say in part it [330] indicates whatever you want to say.

Mr. Selvin: Just a moment. I will object to that upon the ground that the witness' qualifications as a mind reader have not been established. How does he know what you want? I insist that your question be more definite. A balance sheet in one context may have one meaning and in another context may have a different meaning.

(Testimony of E. O. F. Golm.)

The Court: Objection sustained. The witness has told us half a dozen times what was done. He has interpreted and reinterpreted it.

Mr. Hirschfeld: I don't mean to ask the question over. The court apparently ruled against us. I would like to make a change. I would like to ask the witness, with your Honor's permission, whether or not an oral assignment under German law must contain any formal words.

The Court: He has answered that. He said the legal words are very simple and he couldn't use any other words than the words, "I assign." He just said that three minutes ago.

Mr. Hirschfeld: I didn't understand whether that would mean——

The Court: I will have the answer read. There has to be a stopping place somewhere.

Mr. Hirschfeld: I mean, could not legally, or as a matter of usage of words——

The Court: As a usage of words. He said, when you use [331] the words "I assign" in German it means "I assign", and it couldn't mean anything else. That is what he said.

Q. By Mr. Hirschfeld: Doctor, in German law if a person says, "I give it to you," is that good as an assignment?

A. It could be an assignment, yes. "I give it to you", means, "I transfer it to you".

Q. Suppose we say, "It is yours." Is that a good assignment?

(Testimony of E. O. F. Golm.)

A. I wouldn't say that.

Q. "From now on it is yours"?

A. It is impossible to answer this question. It depends upon the circumstances.

Q. If all the parties present know what they are talking about and they are discussing certain things, and the person who has the authority to make the assignment says, "All right, now, take it. It is yours"?

A. In most cases I would say it is a promise and not a transfer. For instance, in English you say, "It is yours. I leave it to you", or something like that. That doesn't mean, "I herewith assign it to you," but, "I am perfectly willing to give it to you." May I refer to an instance like a picture on the wall? It is very beautiful and a guest likes it very much. The host says, "You like it so much it is yours." I wouldn't say it was transferred—the property. It could be; but this is so intricate a question that I would rather let the circumstances—— [332]

Q. By Mr. Hirschfeld: Well, aside from the fact that it is a joke——

A. No, not a joke.

Q. Well, suppose we are concluding a deal and I say, "It is yours." That is good as an assignment, isn't it?

A. It seems rather strange to me, I would say.

Q. I don't care whether it is strange. I mean under the law.

(Testimony of E. O. F. Golm.)

A. Under the law it isn't excluded. It could be considered as to be an asignment.

The Court: Depending upon the circumstances; if they have something physical; corporeal.

Q. By Mr. Hirschfeld: And if the words used by the person is also accompanied by that person's then immediate attempt to assign it, then it is good without any argument at all, isn't it?

A. If a person uses the words, "I give it to you," and really means, "I herewith assign it to you," and the other person understands it in the same way, these are circumstances that would lead to the conclusion that it is an assignment.

Q. But must the other person understand it? Isn't it sufficient that the person who makes the assignment has the [333] intent?

A. The other person has to understand it, because it is a contract.

Mr. Hirschfeld: That is all.

Redirect Examination

Q. By Mr. Selvin: Under German law, Dr. Golm, does a sale, either of a movable or of a right in itself, transfer the title to the thing sold?

A. No. This question has to be answered no. We have a strict distinction between the obligation created by the sale and the fulfillment of the obligation, which is another transaction. It may consist in the delivery or assignment or something else. [334]

Q. By Mr. Selvin: Dr. Golm, in your cross examination [336] there were certain references

(Testimony of E. O. F. Golm.)

to the phrases "Mercantile trader" and "Mercantile transaction". You understand those terms have one particular technical significance in American law. Do they have any technical significance in German law? A. Yes.

Q. By Mr. Selvin: Is there any provision under the law of Germany, requiring the effectiveness for the pledge of a claim, that notice of the pledge be given by the pledgor to the debtor?

A. That is right. As I said before, the pledge of a [337] claim is following the rules of assignment. That means an assignment of the right has to be made. But if it is only an assignment, without any addition, it wouldn't be an assignment as to a pledge. And furthermore, there is a specific provision in Section 1280 which says that the pledge of a claim, to which transfer or assignment is sufficient, is without effect or has only effect if the creditor notifies the debtor of this assignment.

Q. Mr. Hirschfeld, in the course of his cross examination, gave you a number of hypothetical cases in which he used, first, A and B; then A, B and C; then A, B, C and D; cases in which, as he put it, a claim was put up as security for a particular indebtedness; and then asked you in each case whether or not there would be a transfer by operation of law to any particular party upon the payment of the principal indebtedness. In giving your answers to those particular hypo-

(Testimony of E. O. F. Golm.)

thetical cases did you make any assumption as to the type or nature of the transaction or security?

A. I think I did. At least, it was in my mind to do it. And I always said, if this security was given as a pledge, as a lien, or something of this kind, then this would be correct; and in another case, if it was a real assignment, which, also, only had the consequence that the creditor was under the obligation to free the security, to reassign the security or the claim, then there were other consequences.

Q. Then at Mr. Hirschfeld's request you also read into [338] evidence Mr. Loewy's translation of Section 398, et cetera, of the Civil Code of Germany, and certain questions were asked you in that regard. Let me ask you one question with regard to these sections: Do they apply to a transaction where there is no transfer by operation of law of the particular security involved?

A. The question is as to whether or not the sections 398 and the following sections are applicable in cases where there is no transfer of right by operation of law, do I understand?

Q. By Mr. Selvin: That is right.

A. This answer is very simple. Never; because Section 412 says—I think it is Section 412—very clearly that in cases where there is a transfer of right by operation of law, these foregoing provisions are correspondingly applicable. That means, in other words, in case where there is no transfer

(Testimony of E. O. F. Golm.)

by operation of law, these sections are not applicable. They couldn't be.

The Court: Just the reverse.

Q. By Mr. Selvin: In determining the law of Germany [339] with respect to any particular problem——

A. Just a minute. I am not sure about 412.

Q. It is 412. I checked it.

A. That is right.

Q. In determining the law of Germany as to any particular problem or situation, Dr. Golm, are the codes, civil and commercial, and whatever codes and statutes there may be in Germany, the only sources of law?

A. They are the only direct sources, but we have to rely on decisions which have given us interpretation of these sections, and in many cases these interpretations have become common knowledge of a court. We have to rely, furthermore, on certain commenting editions which give an interpretation of certain provisions——

A. ——which may not be completely clear without the interpretations.

The Court: In other words, they rely upon commentators who, because of their scholarship and their special knowledge of the law, are recognized as authority?

A. As certain authority. And in many cases we rely upon such special authority.

Q. By Mr. Selvin: Is it possible, under the law of [340] Germany, for a person to become a

(Testimony of E. O. F. Golm.)

surety for an obligation of some sort, other than the obligation to pay money?

A. That is possible.

Q. And I think at Mr. Hirschfeld's request some reference was made to Section 1225 of the Civil Code, and in reading the English translation I think you read only the last sentence. For the sake of completing the record will you read the entire section?

A. Section 1225 says: "If the pledgor is not the personal debtor, the claim, in so far as he satisfies the pledgee, is transferred to him. The provisions of Section 774 in force as to a surety correspondingly apply."

Mr. Selvin: Subject to the reservation of my right to identify a translation of this decision to which we have had reference, that is all. We rest.

Recross Examination

Q. By Mr. Hirschfeld: Under Section 1280 is it your understanding that this overrules completely and negatives the effect of Section 409?

A. It doesn't overrule it. It isn't even a contradiction to this. Section 409 is dealing with a real assignment and it says that if the creditor informs the debtor that he has assigned the claim, and so on, then it says what happens. And Section 1225 deals with transfer by virtue of law. [341]

Q. Did I say 1225? I meant 1280.

A. 1280? If you said so I made a mistake. Section 1280 deals with a case where a right is not as-

(Testimony of E. O. F. Golm.)

signed to its full extent, but only as a pledge, and it adds to the effect of this assignment a further requirement.

Q. That is one of the reasons why they never pledge, but always assign, isnt' it?

A. It is one of the reasons why banks, especially, prefer an assignment to the full extent, and not a pledge. And it is one of the reasons because never, in operation of law, the transfer takes place; but always the bank holds the security until the bank is satisfied, until the bank re-assigns it.

Q. I don't want to correct you, Doctor, on your translation of Section 412, but as I understood it you translated that in the negative. You said that 412 says that the provisions of Section 399 and following do not apply to the transfer of a claim that is not transferred by operation of law.

A. No. You misunderstood me. I said, and I read the translation which I have before my eyes——

Q. Please read it again.

A. It says, "As to transfer of a claim by virtue of law, the provisions of Sections 399 to 404, 406 to 410 are correspondingly applicable." And in answering the question which I was asked by Mr. Selvin I said it follows from this [342] section that the Sections 399 and following are not correspondingly applicable in cases where there is no operation of law. It is just the reverse.

Q. That is a conclusion; that last part?

A. If you call it a conclusion.

(Testimony of E. O. F. Golm.)

Q. The first part of the translation ends with the affirmative?

The Court: That was very clear from the witness' previous statement. He said, by the very fact that they say this applies where there is a transfer by operation of law, means that if there is no transfer by operation of law then it does not apply. He didn't read it from the translation. He merely said what the reverse of the proposition is was true.

Q. You have stated that in your opinion the commentaries and Supreme Court decisions have a certain effect upon the code law.

A. I think I didn't say they have effect as to the law. I didn't want to say they create law. I say they are very valuable as a means of interpretation, and sometimes we have [343] to rely on such decisions, especially those rendered by the Supreme Court, and also rely on authorities in special fields of law.

Q. Now, my question is this, Doctor: That regardless of how high the court in Germany and regardless of how high and great the author of the commentary may be, no interpretation that they give can ever have the effect of overruling any of the code law?

A. That is undoubtedly correct. An interpretation can not overrule a statute or a provision. Then the interpretation would, by way of my meaning, would no longer be an interpretation. But if it overrules a statute or provision that means that the

(Testimony of E. O. F. Golm.)

determine whether in your opinion it is a correct translation, I will allow you to do that, but there will be no cross examination as to this offer at this time. This was given as a result of your objection yesterday to the statement that he was relying upon that opinion. So I will not rule on the admission now, but will reserve the right to rule later, when you inform me that you are satisfied or not satisfied with the translation. That is all it is offered for. All right; step down, Dr. Golm. We will give it a number for identification.

The Clerk: Defendant's Exhibit E for identification.

The Court: You renew the offer later on, after counsel have had an opportunity to examine it during the noon recess. [347] Anything further?

Mr. Selvin: That is all. [348]

Plaintiffs' Rebuttal

JOE MAY

recalled as witness in behalf of the plaintiffs in rebuttal, testified further as follows:

Direct Examination

Q. By Mr. Blum: Mr. May, are you familiar with the party by the name of the Mr. Aussenberg, or were you familiar with a party by the name of Mr. Aussenberg in 1930? A. Yes, sir.

(Testimony of Joe May.)

Q. Were you familiar with him during August, 1930? A. Yes, sir.

Q. During that period of time did you have any business transaction with Mr. Aussenberg?

A. Yes, sir.

Q. Was there any document executed as the result of that transaction? A. Yes, sir.

Q. Do you know where that document is at the present time? A. No.

Q. Where was it the last time you saw it?

A. The last time I saw it was in Berlin in my offices at Francesstrasse.

Q. When was that? [349]

A. It was 1932, before May Film went into liquidation.

Q. Did it remain in Germany?

A. Probably, yes.

Q. Did you bring it to America with you?

A. No; because it is in the files of the May Film Corporation. The May Film Corporation owns the papers, and it has been in the hands of the liquidator.

Q. Have you any copy of the document?

A. No.

Q. Do you recall what the document contained?

A. Yes.

Q. I will show you Plaintiffs' Exhibit 3, page 3 thereof, and ask you if that document contains any part or portion of that agreement?

Mr. Selvin: Just a moment. I object to the question on the ground that it isn't proper rebuttal;

(Testimony of Joe May.)

upon the further ground that no foundation has been laid sufficient to justify the introduction of secondary evidence. And I would like to point out, your Honor, that in the case in chief the plaintiff apparently relied, for proof of his chain of title, upon various court records and upon various recitals in documents which are in evidence. Whether or not they are proved is a question of argument. We have not denied the existence of the particular documents. We have denied their legal effect. To permit them now to go back and prove their chain of title by proving other and additional facts, it [350] seems to me is not proper rebuttal, and places the defendant at extreme disadvantage in this case.

Mr. Blum: They have denied the efficacy of that judgment and the legal effect, if your Honor please. Therefore, as rebuttal, we are compelled to show what facts did occur.

The Court: I know of no principle of law which allows that to be done. The legal effect of the document is determined by its face. You can't show it was something else.

Mr. Blum: We have not shown the contents of that document in full. It is in Germany, and your Honor has made a ruling that documents in Germany are secondary evidence.

The Court: If you are relying upon those documents as chain of title, I am not going to allow any of them that were not brought in on your direct examination.

(Testimony of Joe May.)

Mr. Blum: You Honor, this part of the document we rely upon is contained in it. It is the agreement between Aussenberg, Joe May and May Film Corporation, whereby Joe May acquired his title, and thereby passed it on to the Bank for Foreign Commerce, and the Bank for Foreign Commerce to Mandl. That is one of the questions. But this is between May Film, Aussenberg and Mandl. It is part of the documents in the record.

The Court: What reference is there in these documents to the document you are trying to prove?

Mr. Blum: The judgment in the declaratory judgment [351] contains a portion of that document and the recital of the document.

Mr. Selvin: The judgment doesn't; the complaint does. The complaint in the declaratory case in Germany, between the Bank and May Film Corporation, contains a quotation of paragraph 3 of the agreement between Aussenberg and Mr. May. May I say that if that agreement, between Aussenberg and Mr. May, is a link in their chain of title it should have been proved in their case in chief, and not after we have rested and excused one of our witnesses.

The Court: You either stand on that judgment and the recital, or go back of it. And you cannot go back of it. I am willing to agree that any document in Germany may be proved by secondary evidence, because of the war conditions. But let us

(Testimony of Joe May.)

assume I would do that, although I doubt very much that I would be justified in brushing aside the rule, the mere fact that this is part of the agreement doesn't give you permission to put in the rest because it isn't part of the judgment. You are relying upon this judgment. Therefore, all that appears in the judgment is material; and things outside of the judgment couldn't be material.

Mr. Blum: It is rather strange to me, your Honor, that where we rely upon a judgment and they are permitted to go back of the judgment, that we are not permitted to rebut it.

The Court: They have not offered evidence of the judgment. They have merely produced experts to show that [352] in their opinion this document does not have the legal effect which you claim for it. You can produce experts to show that it does. They have challenged the judgment; they have challenged the legal effect. They say, "This document, being as it is, does not have the legal effect."

Mr. Blum: They have said that this document, as it appears in part, does not support that judgment.

The Court: But you cannot come back now and produce other documents that prove the rest of the document. Either you *rely your* judgment or you do not rely upon it. You can not rely on both, and when your judgment is challenged say, "All right; the judgment isn't any good. I will prove the facts which support the judgment, on rebuttal." That is

(Testimony of Joe May.)

switching entirely your ground of attack. All they have done is to say, "This judgment does not have the legal effect that you, as plaintiffs, claim for it." As I gather now, what you are trying to do is to prove the agreement in toto so as to be able to argue, if I anticipate your argument, that even if we assume that the judgment, as it stands, does not have the legal effect, we can produce facts to show that in reality an assignment took place. That is, to my mind, what you are trying to prove. Isn't that correct?

Mr. Blum: Not quite, your Honor.

The Court: All right.

Mr. Blum: But if I understand your Honor, your Honor states that Universal is saying that while there is a [353] judgment, May Film no longer owned the judgment, but Joe May owned it; that that judgment does not adjudicate that fact.

The Court: I am not saying that. I am not determining the case. I am merely saying that you produced the judgment, you plead it in your complaint as a basis of your title, and the recital of your judgment is in your complaint. They have challenged the judgment solely upon the ground that it does not show title in the plaintiff. You, as plaintiff, must prove your derivative title. They have said, "We will stipulate that this judgment was rendered, but we produce a witness who says this document, this judgment is not an assignment." Can you come now and say, "This judg-

(Testimony of Joe May.)

ment, upon which I rely, is only partial, because it recites a document; and I am going to refute the document and prove it by secondary evidence to show that there was actually an assignment which was binding upon the defendant and which shows the chain of title." Let us assume this: Suppose this case were a judgment of a state of the United States and this action were in this court under the case of Erie vs. Tompkins I would have to take judicial notice of the particular state, not only as far as statutory law is concerned, but also so far as the common law is concerned. Then suppose the defendant offered absolutely no evidence whatsoever; they could have admitted the judgment; they could have offered no evidence at all as to the meaning of [354] the terms, but supposing they would have said, "We now rest," and started to argue the legal effect of the judgment upon which you rely. Could you, if that were the case, come back and say, "They are challenging it not by evidence as to the facts, but merely by legal interpretation." Could you come back and say, "I ask the privilege of going behind the judgment and show documents of assignment which do not appear in this judgment." Could you have done that?

Mr. Blum: No, not if the defendant said, "Here is a judgment which says something on its face." We say, as a legal effect, that is correct, your Honor. But if they say, "That judgment is not

(Testimony of Joe May.)

correct, because there must be some evidence back of that," and we can show——

The Court: They have not offered any proof. It is mere speculation. They have merely offered an expert to show why, in his opinion, that document does not have the legal effect. They are challenging it on that ground, on the ground that it isn't a judgment in rem, but is a judgment in personam and, therefore, is not binding on the claim against Universal; not because of any facts which they produce in the record, but because of the particular principle that they were not made a party. In other words, they have not offered any proof of any fact attempting to go behind the judgment. They merely say, "This judgment does not amount to what the plaintiff claims it does, for various reasons," which I have already given. How can that justify you in [355] bringing up witnesses who will testify to facts which are behind the judgment, so as to put you in a position to say, "This judgment does that, not because of its recital, but because of other facts which it has failed to recite."

Mr. Blum: My argument is this: that whether they have or have not introduced any evidence showing what is behind that judgment, they have assumed facts and said, "Because there must be this and must be that. There must have been this or there couldn't have been that."

The Court: Those are merely hypothetical ques-

(Testimony of Joe May.)

tions put to an expert whose testimony I may disregard and will disregard if it doesn't carry conviction. He is not testifying to the facts. He is merely telling you that because of certain principles of law it doesn't do that; but nothing he says is evidence of anything beyond the face of the judgment.

Mr. Blum: Nor is there any evidence on their part that there wasn't an assignment from May Film Corporation to Mr. May.

The Court: It is a question of law. It isn't a question of fact. They have not made a factual challenge of this judgment and you cannot go behind it. Otherwise, we will be trying that case. The minute you do that we will be trying, in this American court, the German law; whether there was an assignment under the German law; whether there was an assignment other than by the judgment itself. You start out, in the very beginning of your complaint, by defining the [356] Landgericht, a court of general jurisdiction, then you talk about the Kammergericht, then you start in, "That on or about March 4, 1930, a judgment was rendered in said Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May, and Manfred Liebenau," versus defendant, Universal Pictures Corporation, represented by its attorneys * * * which said action is numbered 74.O.590.26/70 * * *

"That thereafter plaintiff appealed from the

(Testimony of Joe May.)

judgment of said Landgericht to the Kammergericht.

"That on July 27, 1932, said Kammergericht, or court of appellate jurisdiction, rendered its decision" * * *

Then you recite that a dispute arose between the liquidator of the May Film Corporation and its president as to who was the owner, and started the institution of the so-called declaratory action. Then you recite the assignment; you recite the guaranty of Fritz Mandl; you recite the rates. In other words, all you are relying on is not upon facts, but upon facts as transmuted into form of judgments, the ownership of which you claim to be in plaintiff, and which you seek, under the doctrine of comity and under the law, to have enforced by this court.

Mr. Blum: The defendant comes in and says, "We are not bound by it."

The Court: They have not denied the judgment. They merely say, "You are relying on this judgment. We attack it [357] on two grounds. In the first place, it doesn't have the breadth which you claim for it and, second, we weren't parties to it and, therefore, under German law, we are not bound by it." You cannot start in and say, "All right; we will try to litigate the facts." That is a different lawsuit.

Mr. Blum: This judgment is not the basis of the cause of action on which this action is brought.

(Testimony of Joe May.)

This judgment is part of plaintiffs' chain of title, which they say, "We are not bound by."

The Court: You are suing on a foreign judgment.

Mr. Blum: But the foreign judgment in the case of May Film Corporation versus Universal; not the Bank for Foreign Commerce versus May Film Corporation in liquidation.

The Court: Well, both of them. The other is part of your chain of title, because if you disregard the foreign judgment, your declaratory judgment, then the plaintiff has no title. Your only derivation of title is through that second judgment, and you have pleaded it yourself.

Mr. Hirschfeld: May we have a few moments, your Honor?

The Court: Yes. Gentlemen, if you desire time to consult, I can call a recess, but it seems to me it is a matter of evidence that can be determined by the California law. However, if you desire to consult with your experts on foreign law, I will declare a recess.

Mr. Hirschfeld: We would appreciate that, your Honor.

The Court: Very well. The particular objection will be [358] sustained.

(Recess)

The Court: Proceed, gentlemen.

Q. By Mr. Blum: Mr. May, do you know how much Fritz Mandl owed the Bank for Foreign Commerce?

(Testimony of Joe May.)

A. Sixty-four thousand, two hundred and some —I don't know exactly.

Q. By Mr. Blum: Marks?

A. Marks. [359]

Q. Reichmarks? A. Yes.

Q. I show you a document which is Plaintiffs' Exhibit 5, containing a copy of an assignment, and I will ask you if you recognize that as a copy of a document that you signed. A. Yes.

Q. You signed the original of the document?

A. Yes.

Mr. Hirschfeld: Referring to what?

Mr. Blum: Plaintiff's Exhibit 5.

The Court: That is the notice?

Mr. Blum: It is the assignment in the notice.

The Court: The assignment contained in the notice of February 12, 1936.

Mr. Blum: Yes. That assignment was, in fact, given to the Bank for Foreign Commerce.

Q. When you went to the Bank for Foreign Commerce to obtain a loan for the May Film Company tell us what transpired at that time?

Mr. Selvin: Just a moment. We object to that on the ground that there is no foundation laid to show that it is binding on the defendant; upon the further ground that it isn't proper rebuttal.

Mr. Blum: It is to show in more detail the transactions and documents that were made at the bank. It may not be exactly rebuttal, but if it is not, we ask leave of Court to reopen plaintiffs'

(Testimony of Joe May.)

case in chief [360] to show that in more detail. Mr. Mandl and Mr. Lenk have, in some detail, explained it, but we would like to show what this witness knows about it, also, to enlighten the Court on the transaction.

The Court: Objection sustained.

Mr. Blum: I would like to make an offer of proof of what we want to prove in this respect, your Honor.

The Court: It is quite evident what you want to prove, but if you want to put it in the record, go ahead and dictate it to the reporter.

Mr. Blum: We intend to prove by this witness that the May Film Corporation went to the Bank for Foreign Commerce and obtained a loan in a revolving credit up to 100,000 Reichmarks; that at the same time the bank did not consider it a satisfactory risk to make the loan to the May Film Corporation and requested that there be certain other additional security given, and requested that Mr. May, Mr. Aussenberg and Mrs. May sign documents to guarantee that in the event the May Film Corporation refused to pay or failed to pay the obligation that they would pay the same; that in addition to that the Bank for Foreign Commerce required certain security to back up the guarantee of Mr. May, and in that regard Mr. May assigned to the bank the claim, and later the judgment in the case of May Film Corporation versus

(Testimony of Joe May.)

Universal, at which time he claimed to be and was the owner of the judgment; and deposited, in addition thereto, certain other securities; [361] that in addition to that the bank required additional security and required Fritz Mandl to guarantee that in the event the May Film Corporation refused to pay or failed to pay and in the event Joe May failed to pay the obligation of the May Film Corporation, then he would pay the same; and to secure his obligation there was deposited in the Bank for Foreign Commerce a special account consisting, first, of American dollars, later transmuted into French francs, and remained on deposit until the May Film Corporation and Joe May and all others defaulted in the payment, after which the Bank for Foreign Commerce took the money out of the account and satisfied itself to the extent of sixty-four thousand some odd Reichmarks, and thereupon transferred all the security to Mandl.

Mr. Selvin: I make the same objection to the offer of proof.

The Court: Insofar as May is concerned, it is already in the record and not proper cross examination. And the portion that is not already in the record is immaterial and an attempt to vary and add to the contents of the so-called assignment contained in the judgment. Objection sustained on that ground. [362]

HEINZ PINNER

called as a witness by and in behalf of plaintiffs in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Hirschfeld: Dr. Pinner, what was your business or occupation in Germany?

A. I was attorney-at-law in Germany for more than sixteen years. I studied law from 1911 to 1914 in Berlin. Just before the war in 1914 I passed the first law examination in Germany, the so-called Referendar examination.

From 1919 to 1922 I did postgraduate work in Germany. I got the degree of Doctor of Law in 1919, and after the second trade examination I was admitted to the bar in Berlin in 1922. I entered the law firm known as Kempner, Pinner and Schmidt, which was one of the outstanding law firms of Berlin, founded by Mr. Kempner, who was a counsellor of justice, and my father, who was also a counsellor of jus- [363] tice in Germany. I was in this firm from 1922 to 1938. I specialized in trade law. I was a law and legal adviser of many banks and some joint stock banks and some mortgage banks. I was a permanent member of several boards of directors in Germany; was legal adviser for large concerns. My office was the adviser of many American firms; especially my partner, Mr. Kempner, was adviser of the Stillhalte creditors, American bank creditors who have blocks of marks in Germany;

(Testimony of Heinz Pinner.)

and he is still doing this job. Besides my practical business as a lawyer I did scientific work; wrote books; law books; and wrote numerous essays in well-known periodicals. I was shortly, after I became a member of the bar in Berlin, I was collaborator, on the side of my father, in the Commentary on the Trade and Corporation Law in Germany, called the Staub-Pinner Commentary. And after this I became his successor. So I think I have some experience in law, especially corporation matters. As to the Bank for Foreign Commerce, this bank was organized and founded in my office—better say in my father's and my office. I was legal adviser of this bank for the whole time that I was attorney-at-law in Germany, and I only stopped to be a legal adviser when I stopped to be a lawyer in Germany.

Q. By Mr. Hirschfeld: When?

A. When I stopped? On the 30th of November, 1938.

Q. Doctor, I want to show you a photostatic copy of a document in this case, known as Plaintiffs' Exhibit 3. I [364] would like you to look at it and see if it is familiar to you in any way.

A. This seems to be familiar to me.

Q. In what way?

A. This is the complaint made by me and brought into court on the 30th of May 1934 on be-

(Testimony of Heinz Pinner.)

half of the Bank for Foreign Commerce against the May Film Corporation.

Q. On the first page there is the name, "Dr. Heinz Pinner." A. That is me.

Q. Is that yourself?

A. That is me.

Q. By Mr. Hirschfeld: Dr. Pinner, in order to present this case to the Court and to handle the case, did you make any special study of the law involving the issues in this case?

A. Surely I did.

Q. And was one of the issues in this case the effect of certain papers, as to whether it was or was not an assign- [365] ment?

A. That is correct. And again, as I told you already, I was very familiar with the Bank for Foreign Commerce and I saw those people, especially Mr. Lenk, twice, three times, four times a week.

A. Well, I had to examine the documents given to me by the bank and I was of the opinion, and am still of the opinion, that there was an assignment and that the action, that I got the order to bring into court, was a good action, and my opinion was right, because the German judge decided that I was right.

Q. By Mr. Hirschfeld: And this point was contested and argued before the court as to the effect of the assignment?

A. Yes. Let me have a look at it.

(Testimony of Heinz Pinner.)

The Court: What was contested can only be determined by what appears on the face of the judgment itself. That is the general rule.

A. I think it says in the judgment that the May Film Corporation contested the assignment, but I will have to look at it. [366]

Q. By Mr. Hirschfeld: Well, Doctor, to make it a little easier and to conform with the court's idea: That is what is called the judgment roll that you have in your hand, is it not; that is the whole judgment roll? A. Yes.

Q. Yes. Is the klage and the answer to the klage a part of the court's records, what they call the judgment roll?

A. That is what we call a part of the court's files, "gerichts akten." I think that may be the same as what you call the judgment roll.

Q. Will you please examine this exhibit that I have just handed to you. In your opinion, and based on the German law and your investigation of the facts and the judgment and the papers you have, was there a valid transfer of the judgment or of the claim of the May Film Corporation to Joe May? [367]

Q. By Mr. Hirschfeld: From the facts as they appear——

A. From the facts I got, from the information I got, and from the complaint, I never had the slightest doubt but that there was a valid assignment. It was one of the best cases I ever had. I was

(Testimony of Heinz Pinner.)

convinced from the first moment that this complaint must be won in the court, because there was a valid assignment, as to my opinion. If that is what you asked me.

Q. Yes. And that opinion was also the German court's opinion?

The Court: The court gave judgment which stated that May Film Corporation did not own, but that Joe May owned the judgment; is that correct?

A. Yes. I got the judgment according to my complaint, favorable to May. [368]

The Court: All right.

Q. By Mr. Hirschfeld: And, also, that the assignment was made to the Bank for Foreign Commerce?

A. Yes; that is included in the judgment.

Q. Doctor, will you please examine Plaintiffs' Exhibit 5 which I now hand you. I want to save a little time. I will direct your attention to just the part I want. You may ignore the translation. You may look at the letter of the Bank for Foreign Commerce. Incidentally, before you answer, is the Bank for Foreign Commerce, whose name appears in this letter, the bank to which you have referred to as being the one you represented and it is the same one in whose name the prosecution——

A. That is the one I referred to when I made the complaint.

Q. Now, will you please examine that letter.

(Testimony of Heinz Pinner.)

A. I have examined the letter.

Q. First, do you recognize the signatures on the letter?

A. Both those signatures are very well known to me. It is one of the directors, Mr. Lenk, and the other one, the so-called Bankprokuristen, Mr. Schlesinger.

Q. In your opinion, as one of the incorporating lawyers of the bank, did those two gentlemen named in there have authority to execute that letter?

A. They have authority to execute all things for the [369] bank: one director and one of the other men.

Q. Will you first direct your attention to the quotation, the quoted part starting with the fifth line of the letter and ending at the bottom where it has typed the word "Joe May," and will you tell the Court, in your opinion, what is the complete legal effect, under the German law, of that paragraph?

A. The complete legal effect of this paragraph is a transaction known in Germany—now, I have the German word "sicherungsuebereignung." I would translate it in English as "the assignment in trust," maybe. That is the so-called "sicherungsuebereignung"—the usual way between banks and their customers for years and years, to give security by transfer of title for debts instead of making only a pledge. Is that understandable.

(Testimony of Heinz Pinner.)

The Court: Yes.

A. There are two ways of giving securities. You can make a pledge, give a mortgage, or something like that; and you can do a little bit more, so that something happens, as a transfer of title. But, in fact, the intention of the parties is only to make a pledge. It appears like a transfer of title, but in fact is a pledge.

Q. Under German law, in the event of a dispute between the parties, is it permissible to show the intent of the parties? [370]

A. As to German law, it is allowed to show that something what appears to be a transfer of title is, in fact, a pledge. But let me add that not in one out of hundreds of cases would there be a discussion, because everybody knows that a paper like this is only a so-called "sicherungsuebereignung" and doesn't intend to be more than a pledge.

The Court: For your information, that is the general principle of American law, too; that a thing which appears to be a transfer absolute of a deed, may be shown to be given as security for a debt, in a proper action, of course. [371]

Q. In the event such a document is used in pledging securities, and the debt is paid off, is there a re-transfer, by operation of law, where it is shown and accepted and known to be a pledge in effect?

A. The question you ask me now is a little more complicated. I will have to make a little bit longer answer.

(Testimony of Heinz Pinner.)

Q. Are you referring to a book there?

The Court: Identify the book. It was written by several persons, including his father.

A. At this time, unfortunately, the only edition I could get here was 1910, which was written by my father, the book which I referred to and which I was a collaborator later on.

Q. By Mr. Hirschfeld: Who wrote the later editions of that book?

A. The later editions of this book was written by several writers, among them I was—it is some time ago but I was a collaborator for the two last editions; but I don't think that is of importance for the moment.

The Court: All right.

A. If there is only a pledge, not a transfer of title, then, as to the German law, I think there will be no doubt. The pledged property goes back after the payment of the debt, by operation of law, and it also passes to a guarantor—is that the word?—to a guarantor, if he pays the debt; the [372] pledged property passes to him, by operation of law. Now, in your case you have no pledged property, but you have property of which the title was transferred, as is so-called "sicherungsuebereignung."

In this case there was always a little bit of dispute in Germany, as it would be, and in this commentary here that I have before me, this refers to a decision of the German Supreme Court who once

(Testimony of Heinz Pinner.)

said, but in a very early decision, that in a case like yours there have to be a transfer and assignment from the creditor to the guarantor. But this decision doesn't say anything applicable for this case. There is the possibility that in pledging something there may be an agreement between the parties as to what will happen after the debt is paid, and especially in cases in which banks are involved. And it is my opinion, as to my knowledge as a legal adviser of many banks, and especially as the legal adviser of the Bank of Foreign Commerce, as to my knowledge, I say it is always the meaning, the intention of the parties, in pledging property in the form that transfers the title, that after payment of the debt there shall be as little formalities as possible. So if, in this case, Mr. May would have paid his debt himself, but the bank would never have made a re-assignment of this assignment, but would have given him back this paper, or perhaps they would have torn it up; but there never would have had to have been a re-assignment, and if they would have asked me, as a legal adviser, if it was [373] necessary, I would have advised them, "You would only have expense and it isn't necessary to do it." Therefore, in a case like yours, Mr. Mandl pays a debt of Mr. May, there is no doubt that Mr. Mandl has a right to get the claim the Bank for Foreign Commerce held at this time as security. If I understand your question in the right way, your

(Testimony of Heinz Pinner.)

question was if there was necessary a special assignment, or if this transfer from the Bank for Foreign Commerce to Mr. Mandl was by operation of law. Well, in this particular case, particularly only as it involves the bank, in my opinion there wasn't necessary an assignment; but I would have to add, the letter you showed me just now stands as an assignment, although it is superfluous as an assignment.

Q. Briefly, you say, in the case of the bank there was an assignment by operation of law?

A. Yes, because of the intention of the parties from the beginning.

Q. Yes. But notwithstanding that, according to this letter you say this is an assignment?

A. On the end of this letter.

Q. I want to get your complete opinion as to the legal effect of the words in this letter. Directing your attention particularly to the kind of words that are used and their legal effect, will you explain if it is necessary to say, "I assign to you" in order to make a German assignment?

A. Well, this question is to be answered as a plain no. [374] I think it is the same as the American law. The German judge never looks for the words; he looks to the facts. And instead of using the words, "I assign to you," "I give to you," "I transfer to you," I do whatever it indicates and the transfer would be enough. Dr. Lenk, who has writ-

(Testimony of Heinz Pinner.)

ten this letter—who is shown at the bottom of the letter—he was a jurist, too. I think he was a jurist in Czechoslovakia, but I don't know. This Dr. Lenk was of the opinion that an assignment was unnecessary. He refers to the paragraph 774 of the B. G. B. And this paragraph says, with other paragraphs referred to in this paragraph that the securities pass to the payor by operation of law. Apparently Mr. Lenk was of the opinion, and wrote a letter that this claim now has passed to Mr. Mandl. But in case Mr. Lenk was wrong and there should have been an assignment, then it is my opinion that as to German law a German judge would have said that this letter, then, is to be considered as an assignment, because it was the intention of Dr. Lenk to give with this letter the full right of title to Mr. Mandl. And we have a paragraph in Germany in the B. G. B., which may be in paragraph 157, but it may be a mistake on my part, because I haven't seen it for a long time, where it says, as to German law, we don't have to look for words, but only for the intention of the parties.

The Court: Which word do you consider effective to constitute an assignment, other than by operation of law?

A. The statement that the claim has been transferred by [375] means of operation of law, and the other, "You will only be liberated free from your debts when you pay to Mr. Mandl and nobody else."

(Testimony of Heinz Pinner.)

The Court: Which of those phrases do you think could be interpreted as being an actual assignment, as distinguished from an assignment by operation of law?

A. The intent of those last two sentences would be considered from the intention of the parties, an assignment, just from the German law standpoint.

The Court: In other words, your view is that it shows an intent to vest title, even though it isn't, technically speaking, an actual assignment; is that correct?

A. Yes. You must realize that this man who wrote this letter was of the opinion that, "I don't need an assignment." But in my opinion, as to the German law, it is clear, that it is an assignment.

Q. By Mr. Hirschfeld: Even though he didn't say it in express words, it is clear that "It is now yours" and, therefore, it is an assignment?

A. It is not necessary to use the word "assign" at all in Germany. The words, "I assign," "I give you," "It is now yours," is sufficient. [376]

Q. Will you look at 133?

A. Yes. I must confess that 133 is a better one.

Q. Will you please tell the Court what that law is?

A. 133 says, if you have to judge about a declaration of a party, you have to look for the real intent of the parties and have not to look at the words. I think that is how you would say it.

The Court: It is very good colloquial American, I will say that.

(Testimony of Heinz Pinner.)

Q. By Mr. Hirschfeld: Here is a translation in English. You can look at it just to see if any of those words would help you.

A. "Without regard to the literal meaning of the expression."

Yes, that is better English.

Q. By Mr. Hirschfeld: And this book you are looking at is the German Civil Code?

A. Yes, the so-called B. G. B. May I add something to the last answer?

The Court: Yes.

A. That is what I told you, about the possibility that there could be a party agreement to get back the securities without doing any act after payment of the debt. It says in this commentary, to which I referred before. It says that it is construed as a deserving condition—if you [377] know what I mean by this. If I say to you, "I give you this paper, but under the condition that you will give it back to me tomorrow," I give you under a deserving condition that you give it back to me tomorrow. Then, you have to give it back, with no other act, tomorrow. There is nothing else necessary. That is what this commentary here says. That is the intention. The property is given to the Bank for Foreign Commerce with the condition that it will come back by itself when the debt is paid; not by operation of law, but as a consequence of that condition entered into by the parties to the first act. Have I made myself clear?

(Testimony of Heinz Pinner.)

Q. Yes, you have made yourself clear. Is that the customary commercial usage of banks in Germany? A. Yes.

Q. And is that the customary commercial usage of the Bank fuer Auswaertigen Handel?

A. I can't remember a single case in which there was a dispute of this kind between the Bank fuer Auswaertigen Handel and some of our customers.

Q. I now show you a page marked 6 of plaintiffs' Exhibit 3, which is entitled on the top "Asschrift"—— A. Copy.

Q. ——which, for purposes of identification and for counsel's benefit, is the balance sheet. I would like you to examine this balance sheet, please.

A. I know this balance sheet. It was part of my com- [378] plaint.

Q. Yes. A. Added to the complaint.

Q. By taking a piece of paper and putting it on the balance sheet, underneath the line where the word "45.000.—Aktien Kapital" appears, I ask you if that line in fact is not misplaced and should be dropped down one space, as to the 45.000., for the purpose to go opposite the word "Bankguthaben"?

Mr. Hirschfeld: I have in mind this, your Honor: Dr. Golm testified that there was nothing here to show that there was 45,000 marks in the bank. And we are told that by putting this over in this column, adding it to the 60 and 94, it makes it 200.000; and that this should have 200.000 written over here, so that that would make this 200.000, and that is cash in the bank.

(Testimony of Heinz Pinner.)

The Witness: Well, it must be right, because it is a [379] photostat, but there is no doubt—I see it, now. I didn't see it for a long time. There is no doubt it is a misplacement, because I know from my memory——

The Court: No, you can't go on that.

Q. By Mr. Hirschfeld: Without your memory, do you know of these things?

A. I don't have to refer to my memory. The 200,000 here (referring to liabilities) should be no figure at all. That is a mistake. It was admitted before the German courts to be a mistake. That figure is the capital of the company and those 45,000, that is a misplacement. It should be after the word "bank balance." [380]

Q. By Mr. Hirschfeld: According to this balance sheet, does it appear from here that the claim of May Film Corporation against Universal is included as an asset of the company?

A. The claim of either the May Film Corporation or Mr. May against Universal is not in this balance sheet. It is quite clear.

Q. By Mr. Hirschfeld: And if the May Film Corporation still owned the claim against Universal Corporation, under the German law, could it be shown in this balance sheet?

A. There is no difference between the German and American law. [381]

Q. By Mr. Hirschfeld: Is it the law that all assets of a corporation have to be included in a balance sheet? A. Yes. [382]

(Testimony of Heinz Pinner.)

Afternoon Session
2 o'clock

Direct Examination
(Continued)

Q. By Mr. Hirschfeld: Dr. Pinner, according to German law, where a declaratory judgment, or a judgment such as you have in the case of the Bank against May Film Corporation, may be considered not necessarily binding upon third parties, is this judgment accepted by German courts as evidence of title of the subject matter?

Mr. Selvin: To which question we object on the ground that the German procedure is not applicable to this action, but only the German substantive law.

The Court: I have no objection to having the answer, but I do not think that is the law, because, by the doctrine of conflict of laws, the effect to be given a judgment of a foreign court is determined by the law of the forum and not by the court which rendered the judgment. In other words, it is determined by the law of California, not by the law of the country where it was rendered. However, I have no objection [389] to Dr. Pinner answering the question.

A. Yes; it is evidence of title even if it isn't binding against third persons. Do you want me to explain it?

(Testimony of Heinz Pinner.)

The Court: Then, I take it your answer is, it is not binding against third persons that are not before the court?

A. No; in this case there is no doubt it isn't binding against anybody else but against the May Film, but it is—if I can explain it—evidence of title or proof.

Q. By Mr. Hirschfeld: At the time of this assignment and the letter, was the Bank for Foreign Commerce a member of the Devisen stelle? Maybe I haven't asked it right. Was it a Devisen stelle bank?

A. You mean a Devisen bank. As to my knowledge, and I am sure my memory is good, the Bank for Foreign Commerce belonged to the so-called Devisen bank; is where officially admitted banks to deal in foreign exchange, where there is very strong control.

Q. Under strong control?

A. Under strong control.

Q. Would that letter that you have examined, Exhibit 5——

A. Will you be so kind as to show me Exhibit 5? I don't know which paper it is.

Q. Yes. In your opinion, under German law, would this [390] letter, known as Plaintiffs' Exhibit 5, have been permitted to have been sent out of Germany without the permit of the Devisen stelle?

(Testimony of Heinz Pinner.)

A. In this: There was censorship by the Devisen stelle. Not by the military command, not yet; but by the Devisen stelle.

The Court: Censorship of letters in foreign exchange?

A. Yes. They didn't open all letters, but there was a censor. You didn't know whether your letter would be opened or not.

The Court: But there is nothing in that letter to show that the letter was submitted to the authorities of the Devisen stelle before it had been sent out?

A. If this letter had been opened by authorities of the Devisen stelle, I am quite sure it would have been sent back to Berlin, asking if there was permission to make the transfer, because there was a permit necessary. And if it had been opened on the frontier—— [391]

The Court: There is nothing in the letter itself to show whether it was opened? A. No.

The Court: Of course, the Bank might have had authority and not have taken the trouble, feeling that this letter might not be opened.

A. To my knowledge I know that that is what happened, but there is nothing in this letter about it.

Q. And you notice, that letter bears the stamp of the German notary who notarized it?

A. The signature is notarized, yes.

Q. Would the notary have notarized this letter if the transaction had not been approved by the Devisen stelle? [392]

(Testimony of Heinz Pinner.)

The Court: Counsel is trying to elicit what, in your opinion this might or might not show and how the notary might have acted.

A. Well, a notary in Europe is another thing than in America. I was a notary for many years. I always had the custom to read it, but I know many notaries didn't read it. And if I would have read this, I would have asked my client; but it doesn't say, in this particular case, that it was so.

The Court: All right.

Q. By Mr. Hirschfeld: Are you familiar with Dr. Lenk's signature?

A. That is right. I identified one of his signatures this morning. Here is another one.

Q. By Mr. Hirschfeld: Do you recognize this stationery and the signature? [393]

A. The signature, yes. There is no doubt.

Q. Of whom? A. Of Dr. Lenk.

Q. And it is on the stationery of the Bank for Foreign Commerce? A. Yes.

Q. Would you read it, please?

A. I have read it.

Q. Can you tell from an examination of this document whether or not the consent of the Devisen stelle was necessary or if it was obtained, if necessary?

Mr. Selvin: Just a minute, please. I object to that on the ground that it is hearsay and calls for an interpretation. The letter is a letter from Dr. Lenk addressed to Joe May. There is no founda-

(Testimony of Heinz Pinner.)

tion laid to show that it ever came to the knowledge or attention of the defendant or anyone acting in his behalf.

The Court: On what theory do you think this is admissible?

Mr. Hirschfeld: For this reason, your Honor: There can be ten assignments of a claim without Universal Pictures Corporation knowing a thing about it. These assignments can be by conversation; orally. They would not necessarily have to be a party; they would not have to hear it; they would not [394] have to know anything about it. All that needs to be done is that the last assignee shall inform Universal Pictures Corporation that there have been these assignments, and they cannot object to or claim that they were not assignments simply because they didn't hear the words being said, in cases of oral assignments. Now, I am answering the objection based on the ground that it is hearsay. It isn't hearsay with respect to the claim or details of the claim or how the claim was handled.

The Court: This is the rankest kind of proof. It wouldn't be admissible, in an American court, to read this letter.

Mr. Hirschfeld: I only want the first two lines.

The Court: It is addressed to May and says, "I am very happy to inform you that the authorization of the Devisen stelle has been obtained to transfer to Mandl the claim against May Company. Thereby, Mandl succeeded in all to our rights."

(Testimony of Heinz Pinner.)

Mr. Hirschfeld: I don't want to introduce the letter. The Court misunderstands my purpose. I did not want to introduce the letter as to anything beyond the first two lines. If counsel wants to use the rest of it, it is up to him.

The Court: It is from Lenk to May, to the effect that the consent of the Board of Control of Exchange has been ob- [395] tained for the transfer of the debt to Mandl. You cannot prove that by a letter written by a witness who is not here to be cross examined. The second part says that he forwards the letter, in German, the notice, and asks that he have it served in New York with the translation. There is no principle of law under which that could be admitted here for any purpose.

The Court: Objection sustained.

Q. By Mr. Hirschfeld: Can you tell us whether, as a matter of common practice, it was customary, in the normal course of business, for the Bank to obtain consents of the Devisen stelle in those instances where it may be material?

Mr. Selvin: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. He was merely attorney for the bank; he wasn't on the board of directors. [396]

Q. By Mr. Hirschfeld: Do you know what the common practice of the Bank was, from your contact with it, with respect to permission of the Devisen stelle?

(Testimony of Heinz Pinner.)

Mr. Selvin: I object to that upon the same grounds.

The Court: Objection sustained. You cannot prove a specific act by a common practice. [397]

Cross Examination

By Mr. Selvin:

Q. Doctor, in your testimony with respect to whether or not there had been a transfer, by operation of law, of a claim assigned by way of pledge or by way of security, I think you referred to the fact that in the 10th edition of your father's commentaries was a reference to an early Supreme Court decision on that subject. Can you tell us what the reference to that decision is; that is, in what volume and at what page of the Supreme Court reports it may be found?

A. I think it was the decision in Volume 89.

Q. Of course, Volume 89 was published in 1916, so it must be still some other case.

A. Just a moment.

Q. Here is Volume 89 which I place before you.

A. The decision I meant was 1889; not 1916. It may be you misunderstood me. It is a rather early decision, because this institution of sicherungsuebereignung was rather a young institution at that time. And the jurisdiction over sicherungsuebereignung—concerning sicherungsuebereignung, if my memory is quite correct, was given much later. So that I thought to be right, to consider this decision of 1889, as a rather early one; but, anyhow, that is the decision I meant.

(Testimony of Heinz Pinner.)

Q. I just wanted to be sure that was the one. I [398] understood it to be your testimony, also, as to this letter, which is part of Plaintiff's Exhibit 5, the letter dated February 12, 1936, that, in your opinion, if there was no transfer by law that letter, nevertheless, was by itself sufficient to transfer a claim against Universal from the bank to Mandl?

A. That is my opinion.

Q. Under German law an agreement requires, does it not, a declaration of intention or proposal by one party, communicated to another, and acceptance of that proposal by the other party?

A. A transfer——

Q. I am asking you about an agreement; not about a transfer. I ask you if, under German law, an agreement is not a transaction by which a party makes a declaration of intention or proposal, with respect to a certain transaction, to another party, which the other party accepts?

A. I am not in a position to answer this question in this wide form you ask me, because it may be that some kind [399] of agreement is treated a little bit different than another one. I can't tell you here that every agreement must be a declaration of one side, accepted by the other side. That is the usual way.

Q. And then, as I understood your answer just immediately preceding that, you say a transfer or assignment is not an agreement?

(Testimony of Heinz Pinner.)

Mr. Selvin: I will withdraw the word "assignment."

Q. You say a transfer is not an agreement?

A. That is what I said.

Q. Is an assignment an agreement, under German law?

A. It is very difficult for me to answer that question, because I am not quite familiar with the American expression. If I would use the German word "gegenseitiger vertrag"; so I would declare a transfer or assignment is gegenseitiger vertrag. And if "gegenseitiger vertrag" is in the right way translated in English as an agreement, then I would say there is no agreement. But it is rather difficult for me, without an interpreter, to answer those questions when you use words with which I am not quite familiar.

Q. Is an assignment what in German would be called a "vertrag"? [400]

A. Yes, an einseitiger vertrag; a one-sided vertrag.

The Court: Unilateral? A. Yes.

The Court: Other than bilateral? A. Yes.

Q. By Mr. Selvin: Will you turn to Section 398 of the German Civil Code, if you have one before you? A. I haven't.

Q. Then, I will hand you one. Doesn't that section provide in effect that a claim is assigned by an agreement, between the creditor and the other person, by which the claim is transferred to that

(Testimony of Heinz Pinner.)

other person? I am just asking you if that isn't the substantial effect of what Section 398 provides?

A. 398 says there is a possibility that the claim from a creditor may be transferred to another one by—well, now, I use the word, without knowing whether it is the right translation—by agreement. But you will remember, I just answered your last question that there is a vertrag; what I [401] called a unilateral.

The Court: One-sided.

Q. By Mr. Selvin: Will you read Section 398 to yourself, while I read to you a translation which, at the request of Mr. Hirschfeld, has already been read into the record, and state whether or not that isn't a correct translation into English of the effect of Section 398. "A claim may be assigned by the creditor by agreement with another person to the latter. From the conclusion of the agreement the new creditor takes the place of the former creditor."

A. It seems to me to be a correct translation.

Q. But it is your statement, as to the German law, that in such an agreement it isn't necessary that the new creditor or assignee, as we would say, would be any party to that agreement?

A. That is my opinion.

Q. Yes. Then it is your opinion that this letter from the bank, this letter of February 12, 1936, which you [402] have examined, addressed and delivered to Universal Pictures Corporation, but

(Testimony of Heinz Pinner.)

which we will assume, for the purpose of the question, has never been communicated to Mr. Mandl, was in and of itself sufficient to transfer by assignment to Mr. Mandl the claim against Universal?

A. Because I need it for the answer. If you want to ask me if this letter alone, supposing Mr. Mandl didn't get any knowledge, would be sufficient to make an assignment of the claim, you mean?

Q. Yes.

A. I will answer the question with yes, because there is no law which renders any particular form written, or something like that. A transfer can be made orally without any form. And wherever a creditor writes a letter, like he does here, informing the debtor that he has assigned this claim, then I would think that this is an assignment in itself.

Q. Very well, now, in that assignment from May to the bank, which is quoted in this letter, I understood it to be your opinion that on the basis of that quotation alone you would interpret that as an assignment, of the claim referred to in it, to the bank, by way of security or in trust?

A. This quotation contained in the original of Mr. May, of February 9, 1933—— [403]

Q. 1932.

A. 1933 it says here. That is an assignment, because it states in plain words, "I assign with these documents the claim."

Q. I understand it is an assignment, but I understood from your previous testimony that you

(Testimony of Heinz Pinner.)

interpret that assignment as an assignment by way of security, or at least an assignment or transfer in trust?

A. Well, now, I remember what you mean. It was one of the first questions I was asked.

Q. That is right.

A. What I think about it, and I say that because that is a letter written from a debtor of a bank to a bank, it is my opinion that that is a transfer in trust. That is what I said.

Q. Confining yourself for a moment, please, just to the language of the letter which occurs between the word "Die," to which I am pointing, and the word "May," to which I am pointing, and eliminating everything that precedes, eliminate everything that follows it, also eliminate from your mind, please, any knowledge that you may have personally of this transaction; just confine yourself to that language. From that language alone is it your opinion that that is anything but an assignment, to the full extent of that particular claim, to the bank?

[404]

A. If I forget all about the rest, but have only in mind this quotation here, then I would say it is an assignment.

Q. By Mr. Selvin: An assignment to the full extent?

A. I would say it is an assignment.

Q. An assignment and nothing else?

A. And if you would ask me if it was an assignment in full right or for trust, I would tell you that

(Testimony of Heinz Pinner.)

you must tell me the story; it can be both; because it is necessary to see the express words. [405]

Q. Then, on what facts, in addition to the particular assignment, do you base your opinion that it is an assignment or transfer in trust?

A. Because the second line reads as follows: "To our bank was given security for our claim."

Q. Now, you are reading from the second line of the letter itself and not from the assignment; is that right? A. Yes.

Q. That assignment was apparently given or executed on the 9th of February 1933. This letter, from which you have just read that sentence, was apparently written February 12, 1936, which is three years later. A. Yes.

Q. You are interpreting the effect of that 1933 assignment upon the basis not only of its own language, but upon the basis of a statement made three years later.

A. If I received this letter with the quotation in it, that is correct, that I interpret this declaration using the words of a letter written three years later. But if you would have come to me in 1933, before this letter was ever written, and would have asked me what about it, then I would have asked you, "Please be so kind and tell me the story." Then I would have explained to you if it was an assignment with full rights or not.

The Court: As I gather, then, the bank, whose rights would be limited by any qualification of abso-

(Testimony of Heinz Pinner.)

lute assignment, [406] having written this letter three years afterwards and having stated that this was for security, that, of course, would control you in saying it was for security, because the bank admitted it; is that correct?

A. Yes; but I think the custom of the American banks will not be other than the German banks. The German banks like to have as much collateral as possible and, therefore, they don't allow——

The Court: All banks do that.

A. ——they don't allow a declaration that it is only for security. It may be that the inventor of this form here, the form used by the Bank of Foreign Commerce, and were made in my office, were made to protect the bank as much as possible.

Q. By Mr. Selvin: Your idea, in connection with any assignment, was to get an instrument signed by the assignor which would give to the bank, on its face, the fullest possible——

A. On its face, yes.

Q. Take this assignment of Joe May of February 9, 1933, [407] together with the statement of the bank that the assignment was given for security for an obligation which it had against May Film—— A. Yes.

Q. Is it your opinion that that assignment constituted a pledge under the German law, a pledge of that claim?

A. It appears to be in the form of a transfer, of a transfer of title, and in facts material it is a pledge.

(Testimony of Heinz Pinner.)

Q. If it is a pledge under German law, in order to be effective the pledgee would have to notify the debtor of the fact of the pledge, would he not, or one of the parties?

A. That is one of the reasons that the banks never take a pledge, but take a transfer of title.

Q. In order to avoid the necessity of giving a notice to the debtor of the fact of the pledge you take assignment to the title, rather than a pledge?.

A. That is one of the reasons.

Q. And if it were really a pledge—I am speaking hypothetically now—if the bank really took a pledge of a claim, what is strictly a pledge under German law, that pledge [408] would be ineffective unless notice to the debtor were given as to the fact of the pledge?

A. This is a hypothetical question. Please allow me not to answer, because I am not sure of the situation.

Q. Suppose you look at Section 1280 of the Civil Code.

A. You can't expect that I know all those sections. Yes, it would be ineffective without notice. That is 1280.

Q. When, under German law, there is a transfer of a thing or a claim, either one, by operation of law; that is, the ownership of that thing or claim passes by operation of law, what you mean when you say that that occurs is that as a result of certain acts there is automatically, and without the require-

(Testimony of Heinz Pinner.)

ment of any express transfer of title, an actual passage of title; isn't that right?

A. That is what is called operation by law.

Q. And that is as distinguished from a transfer of title which takes place by agreement of the parties; is that right? A. That is correct.

Q. When you gave the opinion this morning that there had been a transfer from the bank to Mandl of the title to the claim against Universal, you based that opinion, did you not, on what you considered to be the real intent of the parties, as gathered from the document, the facts and circumstances? [409] A. That is correct.

Q. When you interpret a document or agreement between parties upon the basis of what their real intent is, as shown by the circumstances, and you conclude that their intention was that in a particular situation there should be a real transfer or real vesting of a particular thing or claim, what you are really doing, is it not, is deciding that that was their agreement; while it hadn't been perfectly expressed, nevertheless, that was really the agreement that they made; isn't that right?

A. Yes.

Q. So that when you do make such an interpretation the conclusion you arrive at is not that there has been a transfer by operation of law, but that there has been a transfer by act of the parties?

A. No, that is not my opinion. I don't think

(Testimony of Heinz Pinner.)

I said it this morning. What I said was that the bank or this Mr. Lenk was of the opinion that there was a transfer by operation of law; but if he made a mistake then I made, from the two last sentences of the letter, the conclusion that the things was a transfer intended by the parties, because there can be no doubt that a bank like the Bank for Foreign Commerce would not keep a security one moment longer than it was entitled to.

Q. When you interpret any particular document under German law, for the purpose of discovering the intent of the [410] parties, you determine that intent, do you not, on the basis of the objective evidences of it; that is, on the basis of what the party has said and done, and not on the basis of what, secretly and unknown to the other party, may be in his mind?

A. I didn't get the meaning of that question, because there is—secretly? Let me say this, then you can explain it to me: It is my fault.

Q. It is probably my fault, because I didn't make the question so you understand.

A. Mr. Mandl paid a certain sum to the bank. And it was quite clear, as to German law, that he had to get it some way, either by operation of law or by transferring the security, including this claim. Now, I can't understand what you talk about secret things. There was quite an understanding between Mr. May and Mr. Mandl.

(Testimony of Heinz Pinner.)

The Court: What he wants to know, is that understanding clear to you from the letter, or is it——

A. It is very difficult to forget all about those things. For years I knew all of those people of the bank, like very close friends. I saw them every week, and I know it was one of the correctest banks, and therefore——

Mr. Selvin: I move to strike that last statement of the witness as voluntary and a conclusion.

The Court: That last part may be stricken. I think the first part was responsive to my question. [411]

Mr. Selvin: Yes, but I think that statement about the bank being the correctest institution in Germany goes a little beyond the issues.

The Court: Yes.

Q. By Mr. Selvin: Suppose a corporation in Germany has a claim which it considers valueless, would it be required, under the law, to put that claim down in its balance sheet?

A. No. [412]

The Court: I am inclined to think that the witness is right; that there would have to be a further service before the agency is established that would sequester a fund that was claimed by others. [419]

Mr. Selvin: In view of your Honor's statement, that is all of our cross examination of this witness.

Redirect Examination

Q. By Mr. Hirschfeld: Dr. Pinner, assuming that under the German law the approval of Mr.

(Testimony of Heinz Pinner.)

Mandl to this assignment was necessary, when would it have to be evidenced and how? Or is there a provision of the German law to the effect that an act done for the benefit of somebody else is presumed to be accepted by him?

The Court: Do you understand the question, Doctor?

A. I don't understand it. I don't know what is meant by the question.

The Court: Break it up.

A. Be so kind to explain a little bit what you are asking me. If there would be necessary consent of Mr. Mandl, at what time Mr. Mandl would have to give his consent?

Q. By Mr. Hirschfeld: That is the first of it. Is there any time he would have to give his consent, assuming he had to make a consent?

A. If it was necessary to give his consent, there would be a provision of law for that consent. Otherwise I would answer this question: He can still give it still today. On the [420] other hand, the German law always provides——

Q. Please, Doctor, don't volunteer. We cannot let you argue the point. I just want your opinion of the law. Assuming, for the sake of a hypothetical question, that a party who owes me is not told that the claim has been assigned one, two, three, or four times, and assume that this party does not pay the claim to anybody, and finally after the No. 4, the fourth man who gets it, notifies the debtor, "I now

(Testimony of Heinz Pinner.)

have this claim;" and assume that in the meantime the debtor has never paid anybody; does this notice or the assignment to the fourth party fail, under German law, because maybe No. 2 and No. 3 assignee never told the debtor about it?

A. The fact that the debtor didn't get notice from the first or second or third assignee, and only got notice from the fourth assignee, doesn't prevent the fourth assignee to ask for the money from the debtor. Is that what you want?

Mr. Hirschfeld: Yes, that is what I want. [421]

Q. By Mr. Hirschfeld: That is your opinion as to the law in Germany?

A. Yes. There is no doubt. [422]

Mr. Hirschfeld: Universal Pictures Corporation, which, I understand, to be December——

Mr. Selvin: It was dissolved December 31, 1936. [424]

The Court: All right.

Mr. Hirschfeld: And the other thing, your Honor, is an original letter from myself to Universal Pictures Corporation, together with the reply thereto. And may we consider that the evidence that Mr. Selvin has furnished, as to the date of dissolution, together with this letter, may be introduced under our case in chief? [425]

The Court: We will give back to Mr. Selvin the copy. The two letters, the letter of March 26, 1936, and the answer of April 6, 1936, and the envelope

(Testimony of Heinz Pinner.)

which evidently accompanied Mr. Hirschfeld's letter, may be received as one exhibit.

The Clerk: Plaintiffs' Exhibit 13. [426]

PLAINTIFFS' EXHIBIT No. 13

Law Offices
Ellis I. Hirschfeld

Suite 1215 Bankers Building
629 South Hill Street
Los Angeles
TRinity 4567

March 26, 1936

Universal Pictures Corporation
Rockefeller Center
New York

Universal Pictures Corporation
Universal City, California

Mr. J. Cheever Cowdin

Gentlemen:

This is to advise you that we, the undersigned represent Mr. Fritz Mandl who has instructed us to file this claim with you. Mr. Mandl by proper assignment is the owner of a judgment rendered July 27, 1932 by the Kammergrericht (District Court of Appeal in Berlin) No. 25U5849/30, further numbered 74 "O"590/26, which judgment was

(Testimony of Heinz Pinner.)

affirmed by the Reichsgericht (Supreme Court of Germany) on February 3, 1933, No. VII 324/1932. This judgment was rendered in a suit brought by the May Film Aktiengesellschaft against the Universal Pictures Corporation, 730 5th Avenue, New York, represented by the board, President, Carl Laemmle, Vice President, Robert H. Cochrane, Secretary, Helen E. Hughes, Treasurer, E. H. Goldstein.

The judgment ordered the defendants to pay to the plaintiffs 50,000 reichs marks together with interest thereon at the rate of the German Central Bank (Reichsbank) Discount, plus two per cent from July 1, 1926. The claim at the present time, as of March 24, 1936, is 86,816.45 Reichs Marks or approximately $35,000.00, plus interest on 50,000 marks from said March 24, 1936 at the rate of six per cent per annum until said discount rate is changed.

This claim is being sent to you with instructions that you have it presented or present it yourself in the escrow in which the sale of the defendant's company is being handled. If there is any further information you desire on this matter, kindly communicate with the undersigned. Also kindly wire me at my expense the name of the bank and description of the escrow so that this claim may be properly filed therein.

Very truly yours,

ELLIS I. HIRSCHFELD.

EIH:HM

(Testimony of Heinz Pinner.)

[Envelope, containing the following]:

Law Offices Ellis I. Hirschfeld, Suite 1215 Bankers Building, 629 South Hill Street, Los Angeles.

(Addressed to) Universal Pictures Corporation Rockefeller Center New York City.

(Stamped) Los Angeles, Calif Mar 27 7:35 PM 1936 Arcade Sta. 1

Universal Pictures Corporation
Rockefeller Center
New York

Willard S. McKay — April 6th, 1936
General Counsel

Ellis I. Hirschfeld, Esq.,
629 South Hill Street,
Los Angeles, Cal.

Re: May Film vs. Universal

Dear Sir:

This will acknowledge receipt of your letter of March 26th. Universal Pictures Corporation has never recognized the validity of the claim which you mention, or of the alleged judgment in support thereof.

Very truly yours,
WILLARD S. McKAY.

[Endorsed]: Filed Sept. 27, 1940.

HANS SCHWARZER

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Hans Schwarzer.

Direct Examination

Q. By Mr. Hirschfeld: Dr. Schwarzer, will you please state your legal experience and experience with juristic matters in Germany.

A. I studied law from 1918 until 1921 at the University of Berlin, Freiburg and Frankfort. In 1921 I passed my first state examination, the so-called Referendar examination. Then I went to a bank in Berlin and worked there until 1925. In 1925 I became a Referendar again. In 1929 I passed my so-called Assessor's, the second state examination. From 1929 until 1930 I was the judge of the court there, the Superior Court in Berlin, and I worked for an attorney. In 1931 I received a license to practice law and I practiced law from 1931 until 1933. In 1932 I got a recommendation from the German government, from the Insurance Commissioner, to liquidate one of the biggest companies in Berlin, and that is what I did until September 1938. Until 1933 I was a partner in a bank, and for ten years I was a member of the Berlin Stock Exchange, also, besides my practice.

Q. Are you familiar with Section 774 of the German Civil [427] Code?

(Testimony of Hans Schwarzer.)

A. Yes, I am.

Q. Are you familiar with the Supreme Court decision in 89 Reichsgericht Reports at page 193?

A. Yes, to some extent I am familiar. I read it yesterday and yesterday I made myself familiar with it, but I don't know it by heart, of course.

Q. I hand you the volume, together with a purported English translation, and I would like you to state to the Court your opinion of a transaction based upon the following hypothetical case, and these names, for the purpose of this hypothetical case, can be considered to be fictitious, for the purpose of the question. Suppose a corporation by the name of the May Film Company A.-G. files a suit against an American corporation doing business in Germany, and in the first instance, in the trial court, receives a judgment to the effect that they are not entitled to any claim; that corporation then appeals the case and after the appellate court has passed upon it a judgment is rendered in favor of the May Film Company for 50,000 marks; and further assume that both parties to the case prosecute an appeal to the Reichsgericht and that in the final court the Kammergericht or the appellate court judgment is affirmed; assume that there is an assignment of this claim from the May Film to Joe May in the form and in the words that are set out in Plaintiffs' Exhibit 5 in the language from the fifth line down from the top, start- [428]

(Testimony of Hans Schwarzer.)

ing with the words, "Die Universal Pictures Corporation New York" and ending with the words "Joe May"——

Mr. Selvin: That isn't an assignment from May Film to Joe May.

Mr. Hirschfeld: Just a minute. I got the wrong one.

Mr. Selvin: You want Plaintiffs' Exhibit 3.

Mr. Hirschfeld: Yes.

Mr. Selvin: Page 181.

Mr. Hirschfeld: Thank you very much.

Q. Just forget what I said, for a moment, about Plaintiffs' Exhibit 5.—in the words as contained on page 3 of the exhibit 3, also marked at the bottom 181; and assume further that Joe May assigns the claim in the words of Plaintiffs' Exhibit 5, that I described to you a moment ago. Assume further that one Fritz Mandl guarantees the obligation that is described and as it appears from the balance of the letter in Plaintiffs' Exhibit 5. Will you examine that to be sure you have them all in mind? Having all these facts in mind and having in mind the provisions of Section 774, will you now give us your opinion of that Supreme Court case and its meaning, insofar as it deals with the problems indicated by these various exhibits and assignments? I want to eliminate all other matters and things of the case.

A. May I ask one question to be sure?

The Court: Yes. [429]

(Testimony of Hans Schwarzer.)

A. This is a question for an examination of the so-called Referendar examination, and I am sure you can get different opinions on it with some different reasons. But let me answer the question as shortly and as well as I can. We have a lot of decisions on "sicherungsuebereignung." The Supreme Court, in one of the early decisions on sicherungsuebereignung—it has become well known and developed in the last ten years; in the last five years more and more; and the Supreme Court always had the opinion that is expressed here in this decision: Will not transfer to the plaintiff a certain kind of shares by operation of law, nor the transfer of the claim. Section 774 Civil Code. However, in the economic effect the transfer of ownership as security and the giving of a pledge are very similar or even coincide. The fiduciary, like the pledgee, is given the right for the purpose of security, only he must not keep it longer than is necessary for [430] this purpose. Now, I can't answer the question with yes or no.

The Court: Go ahead. Nobody is interfering with you.

A. Now, here was your hypothetical case: They were different agreements. As I understand your question in this hypothetical case, Mr. Mandl went to the bank, telling the bank, "I guarantee your claim. I know you have security." And whether they spoke about it or not, as to German law the understanding was, "Insofar as I will have to pay

(Testimony of Hans Schwarzer.)

out of my guarantee—I will have to pay you—you will have to give me what you are holding as security." They didn't have to speak about it under German law. If they wouldn't have spoken about —if this wouldn't have been the will and intent of the parties, then this would have been a gift either to the bank or to Joe May or to May Company. And, therefore, I don't care—I mean, if you couldn't tell me whether they spoke about it or not, the agreement was, "I am under guarantee and in case I will have to pay, I will have to get all securities you have for this claim that I have to guarantee now to pay later." In this decision the German Supreme Court waives a very strict form for the transfer of a certain kind of shares. You couldn't transfer these shares without a writing, which is different than we have today. But the German Supreme Court waives this law form, because it said in this decision, "We can't use 774 directly, but we use it indirectly, and the understanding and intent of the parties was that this shall be [431] transferred, and so it is only a side effect of the agreement." Now, I heard more about the case. May I go ahead without your question?

The Court: Yes, complete your discussion. You are testifying as an expert and you can give your reasons, if you desire; not beyond the facts, but you may go beyond any law that counsel has called attention to. You can't go beyond the facts.

A. No, I wouldn't do that, but I would like to tell the story. You see, in this letter you showed

(Testimony of Hans Schwarzer.)

me of February 12, 1936, the bank informs the main debtor, as the German language calls it—Universal Pictures—they inform them, "We want you to pay to Mr. Mandl."—I am awful sorry, I have a little bit to argue with Mr. Pinner—I feel in my opinion an agreement is necessary. It wouldn't be enough if the bank would sign a paper, "We assign to Mandl," without any knowledge of Mandl, without his consent, without his knowing, without his doing anything; but in this case you have to consider an agreement, because of the things which happened before and considering the things which happened later. An agreement, under German law, means very specifically an offer and an acceptance. But if you care to use an example, a child and a milk-nickel—pardon the example—the child doesn't have to say, "I accept it," but takes it. That is a fact of a silent understanding or silent expression. And you have the same in German law in [432] 151. In 155 you have the determination of what is an agreement, and you will find, in 151—no, 152—that an acceptance of an offer is necessary to make an agreement; that this acceptance could be done and could be executed before the offer or after the offer, or you even don't have to accept the offer. I don't know whether I can translate it very well, but you have a translation of the German Civil Code, and you find in 151—may I read it in German or shall I read it in English?

A. Maybe I had better read it in English. In 151 you find: "The contract is completed by ac-

(Testimony of Hans Schwarzer.)

ceptance nor need notice of the acceptance have been given to the proponent of the proposition, if according to commercial usage such notice is not expected or if the proponent has waived the same."

And in 152: "If a contract is authenticated judicially"—no, I made a mistake. Not 152. 151.

A. 151. In this hypothetical case, in my opinion the necessary acceptance of Mandl had been given, had been expressed when he signed the guarantee, knowing that there were the securities; and finally, when you showed the letter of Mandl to the Universal, this would be an effect; and, also, if you would consider the bank's letter to the Universal, as [433] an offer to assign, then you have Mandl's acceptance by his letter to the Universal asking for the money. But even if nothing happened, you can construe that by silence—I don't know whether it is possible in English to say "silent expression."

The Court: Implied.

A. Implied. Thank you very much. You have to suppose that acceptance. No need of notice of the acceptance has been given of the acceptance if, according to commercial usage, such notice is not expected, because it is only to his benefit.

The Court: It is implied, then, from the circumstances?

A. From the circumstances. I would say from the circumstances, because of the first agreement.

The Court: The presumption being that he wouldn't waive something to his benefit?

(Testimony of Hans Schwarzer.)

A. That is the first part. And second, he wouldn't waive what is to his benefit; and the third point is the letter. With the letter he didn't have to say, "I accept this offer," but if the assignor writes to the debtor, "Pay to Mr. X,"—to the assignee, and the assignee writes to the debtor, "Now you have to pay to me," then this is an acceptance of the offer by German law.

Q. By Mr. Hirschfeld: If the assignee files a suit, is that an acceptance?

A. He couldn't express his acceptance more expressively. [434] Yes, it is; more than a letter. As we heard this morning, in 133 of the German Civil Code, he wouldn't have to say, "I assign"; he wouldn't have to say, "I accept"; he wouldn't have to say, "I offer." He has to do something which, under common sense and judgment, we have to consider as his intent. A demand by suit is more than a demand by letter, and this would express his acceptance.

Q. You have examined this judgment between the bank and the May Film Corporation?

A. Yes, I have.

Q. Without considering for the moment whether or not that judgment is binding upon third parties, what is its legal effect, in your opinion?

A. As to German law?

Q. Yes.

A. It is. In a German case if the plaintiff would produce such a judgment he would produce more

(Testimony of Hans Schwarzer.)

than an assignment. He would produce an assignment which has been confirmed by a court. In a case it would be evidence.

Q. Not conclusive on the third party, but evidence of an assignment?

A. Not conclusive, of course not, but another party would have to bring certain exact facts and say, "This judgment or this assignment or the contents of this judgment is not legal or not true or not correct or right, because the judgment made a mistake"; or something like that; but we have [435] to prove it. The plaintiff has the advantage that he has the proof, and the other side would have to prove that this is wrong and why, with facts; bringing facts and proof.

Q. Will you examine this exhibit, Plaintiffs' Exhibit 5, and read the lines starting at "Die Universal Pictures Corporation" and ending with the name "Joe May." A. Yes.

Q. In your opinion is that a good transfer of the claim described therein? A. Yes, it is.

Q. Without considering the letter, what goes before it or what goes behind it, will you give us your interpretation of the effect of that?

A. It is a usual assignment as it is customary in Germany to transfer a claim to a bank and—I know what you mean. Let me answer it before——

The Court: It is a usual assignment——

A. It is a correct and usual assignment, and by the German law, without any mistakes or any

(Testimony of Hans Schwarzer.)

wrong things. It is the best assignment which is possible. I mean a correct assignment. I couldn't say more.

Q. By Mr. Hirschfeld: Now, does this assignment vest the title of the claim in the bank, in your opinion, and does this assignment give to the bank the ownership of the claim? [436]

A. Yes, it does, but you have to consider the parties of every agreement, in Germany. It is a difference if two postmen made an agreement, or a bank and customer.

Q. Does it appear from here whether there is a bank involved?

A. Yes. This is the Bank fuer Auswaertigen Handel. You see here, "I assign to the Bank fuer Auswaertigen Handel."

Q. According to your statement is it true, according to German law, that where an assignment is made to a bank it is always viewed with a certain amount of, shall we say either suspicion or knowledge, or an idea that it isn't an absolute, outright sale or transfer, but there is something else to go with it? [437]

A. If this document would come to me, as a German judge in a German court, my first thought would be that this is a security; this is a pledge; this would be prima facie evidence, because of the parties involved.

The Court: You would assume that it wasn't a transfer of a claim to the bank, except in connection with some transaction? A. Yes, always.

(Testimony of Hans Schwarzer.)

The Court: But you would have to find out what it was, whether it was a loan, or security for a loan of that person or somebody else; and you would merely assume that some kind of [438] ownership might be defeated later on, depending upon the bank transaction involved?

A. That is correct.

The Court: You couldn't say specifically that it was made as security for this man's loan, or somebody else's loan?

A. No, but I would go so far—if somebody would pretend that this had been a sale on the side of the bank, a sale of the claim, I would go so far that I would have him to prove it—I would want him to prove it, because it is prima facie evidence. It is 999 times in a thousand that it has to be a security.

The Court: In conjunction with a banking transaction? A. Yes.

The Court: But the particular details would have to be supplied by details outside of the instrument itself?

A. Yes. The banks like to get it as clear as possible, so as not to have any strings, because if they get it for a debt of so-and-so, then they would have to prove the debt.

The Court: All right.

Q. By Mr. Hirschfeld: Assume, for the purpose of our discussion now, that an act of some kind

(Testimony of Hans Schwarzer.)

is needed by Mr. Mandl to accept the assignment made, under your interpretation of a bilateral contract; would Plaintiffs' Exhibit 13, in your opinion, meet this requirement for a subsequent ratification, or acceptance, rather, of the assign- [439] ment?

A. Yes, it would, as I told you before and as I answered before, and especially because of the dates. You see, the Bank fuer Auswaertigen Handel wrote to Universal on the 12th of February, and this letter had been written March 26, 1936. So you have not only the possibility, but you have to take both together.

Mr. Hirschfeld: Counsel, of course, will stipulate, will he not, that Willard S. McKay, is general counsel for Universal Pictures Corporation and did have authority to answer the letter of March 26th?

Mr. Selvin: I will stipulate that he was general counsel at that time and that he did have authority at that time. He is no longer general counsel.

Q. Will you please examine the exhibit of the process of the Amtsgericht?

The Court: I think I can save a lot of time right now on this proposition by making this announcement, and I think you will find it would be accepted by any law of any civilized country: The nature of a writ of execution, whether under the Roman law or any other law, is a compulsory writ issued out of a court, the effect of which is to sequester a debt and tie it in the hands of a person, to apply it to a judgment. If the debtor is a bank the bank is com-

(Testimony of Hans Schwarzer.)

pelled to keep out of [440] the funds in its hands, belonging to the judgment debtor, an amount sufficient to cover it. That is the law of every country in the world. If the person upon whom the writ is served does not at the time have anything in his possession, the writ cannot attach anything; it cannot sequester anything. If the person on whom it is served, either because it is a different juristic entity, or even an agency or a subordinate body of another corporation, and does not represent the judgment debtor from whom the money is owing, the attachment catches nothing. Now, here, the debtor which held the money due was a New York corporation, or was a Delaware corporation, wasn't it?

The Court: At the time the Deutsche Universal Film A.-G. was served, it had no authority to accept service for the New York corporation. Therefore, the attachment attached nothing; sequestered nothing. Universal Pictures Corporation could not affect the rights of the attaching creditor by, six months afterwards, telling them, "You represent us in [441] what you did before." So I don't think we need to argue that any further, unless you can show me something that will change my mind. I don't see how you can validate an attachment levied upon a person who was not an agent. [442]

The Witness: I had forgotten to mention about this letter, whether this would be an assignment. I had forgotten to answer that it is very unsual, and I think it is the first time that I ever saw it, even

(Testimony of Hans Schwarzer.)

when I was legal adviser of an insurance company, that a letter with signatures below the letter, and the letter has been notarized in Germany. And this is the usual expression for a bank to assign something, and generally they have to do it in mortgages, and for this reason they sometimes often do it, if they want to express that they want to transfer something, to show it to the outside, to make it so that nobody could attach it. [447]

The Court: Couldn't that explanation also apply to the fact that this was a letter written in Germany, intended as notice to a foreign corporation, and that the attestation was necessary in order that a signature might be verified if it were necessary?

A. No, your Honor. I don't like to argue——

The Court: I am not arguing. I just asked you a question.

A. No. And I don't want to become a lawyer here. But the letter says, "I would like to inform you that 774 applies." That wouldn't be of any value and it wouldn't be necessary to get a notary to have it notarized; but the banks do it showing a legal——

Mr. Selvin: That there is a legal transaction involved. That is what you wanted to explain?

Mr. Hirschfeld: In other words, it is an assignment? A. Yes, it is an assignment. [448]

DR. H. A. GEBHARDT

called as a witness in rebuttal on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Hirschfeld: Dr. Gebhardt, in your position as attorney for the German Consulate, do you have any experience with those rules and regulations of the Devisen stelle? A. I have.

Q. Just tell the court with reference——

Mr. Selvin: May I have the question, please?

Mr. Hirschfeld: It was merely to qualify him.

A. There can't be any transfer, in matters of transfer of assets, either from the United States to Germany or from Germany to the United States. I got the latest rules and regulations and laws of Germany until very recently. They are issued in looseleaf form.

Q. By Mr. Hirschfeld: Were you so familiar with the Devisen stelle rules and regulations in February 1930?

A. I might mention in this connection, your Honor, it was one of the most fertile fields of regulations and rules in Germany. They change almost every few weeks, anyway, so I think I was as familiar as I could be, under the circumstances, being away several thousand miles.

Q. Dr. Gebhardt, please forget, for the purpose of this question, that you know anything about a French franc trans- [449] action in this case, and

(Testimony of Dr. H. A. Gebhardt.)

please ignore completely the fact that there was any deposit or guaranty for the security, but confine your answer to just this particular portion: Do you have an opinion if, under the Devisen stelle laws or other laws applicable thereto, it was necessary in February 1930, or at any time thereafter, to sell or transfer or assign a claim, together with the judgment, to a non-resident of Germany?

A. There isn't any question about it. Under those facts the consent had to be given by the Devisen stelle. The principle being that if anything goes out of Germany there has to be a consent of the Devisen stelle, the same as if something goes into Germany, in foreign exchange, in order that the Reichsbank may know.

Mr. Hirschfeld: Read the question.

(Question read by the reporter.)

A. 1930? Well, I did misunderstand. I understand the question to be 1936.

Mr. Selvin: He said 1930 or at any time thereafter. [450]

Mr. Hirschfeld: Let me rephrase my question, because I complicated it.

Q. First, was it necessary to get the Devisen stelle permit to release French francs for a blocked account, for any purpose, in Germany, where a non-resident was involved?

A. A blocked account?

The Court: That wouldn't be a blocked account. A blocked account would only apply to marks.

(Testimony of Dr. H. A. Gebhardt.)

Mr. Selvin: There is the word "gesperrtes account," which I tried to translate into "blocked account."

The Witness: "Gesperrtes account" is an impounded account.

The Court: All right.

Q. By Mr. Hirschfeld: Is it necessary to get the Devisen stelle permit to release, from a blocked account in Germany, foreign francs or foreign exchange for the use in Germany on behalf of a non-resident? A. Yes, it is.

Q. Is it necessary to get the Devisen stelle permit to simply assign a claim?

Mr. Hirschfeld: To a non-resident.

A. Yes, it is.

Q. By Mr. Hirschfeld: In your experience in the handling of these claims and matters in Germany, can you say [451] whether or not, from your examination of any of the exhibits in this case, such a permit was given in this instance?

A. Well, I don't know of any document, that refers to the permit of the control office, in the files of the action.

The Court: I don't see that there is any other supposition. Any of the rest of it would be a deduction.

The Witness: I have seen some documents referring to it, but I haven't seen them in the files.

Mr. Hirschfeld: At this time I would like to ask Mr. Selvin if he will produce the copy of the permit.

(Testimony of Dr. H. A. Gebhardt.)

Mr. Selvin: I have a copy of it. I don't say that it [452] is the permit. In the letters of the Universal file I find attached to the letters an English translation which purports to be a permit of some sort. Here it is.

The Court: May I look at it. If it isn't material, I will disregard it.

Mr. Selvin: That is all I have. Here is a translation. I think this is the German copy.

Mr. Hirschfeld: I would like to use it, but——

Mr. Selvin: I won't stipulate that it is a correct copy or that it is any such permit.

The Court: You can't do it.

Mr. Hirschfeld: Not unless counsel stipulates. Your Honor, I was surprised at the answer. What I had done, I had divided the thing into two separate independent transactions not connected with each other.

The Court: Go ahead.

Q. By Mr. Hirschfeld: Dr. Gebhardt, assume there was a French franc account involved, or a deposit of French francs which would have required a Devisen stelle permit. Then, after that was given would it be necessary to have another permit to transfer the judgment?

A. In other words, if the French franc account is exchanged for something of equal foreign currency or if, by operation of law, something would pass out of Germany in foreign exchange, the two transactions are absolutely interlinked, so that by

(Testimony of Dr. H. A. Gebhardt.)

accepting a free French franc account for the [453] security, which would be considered in the nature of Devisen going out of Germany, in my opinion it would not require any further permit.

The Court: Because it is all one transaction?

A. As I stated, these rules are very difficult and are changed from time to time. The rules are in force, but different over certain districts, and they are changed from time to time; changed quite frequently by administrative orders; but the principle would be that if something equal is accepted and something equal goes out it would be a part of one transaction.

Mr. Hirschfeld: You may cross examine.

Mr. Selvin: I have no questions.

Mr. Hirschfeld: I was intending, your Honor, at the end of the case, to move to strike that attachment, but in view of your Honor's very complete—

The Court: You don't have to strike it. The effect has been given of what it will be.

Mr. Selvin: Your Honor, I want to renew my offer on Defendant's Exhibit E.

The Court: I think counsel assumed it was already in, because he examined with respect to a date on it. [454]

DEFENDANT'S EXHIBIT E

TRANSLATION OF DECISION OF SUPREME COURT OF GERMANY, 80 REICHSGERICHT REPORTS, 193.

1. To what extent does a thing transferred to ownership by the debtor or a third person, or a right transferred, inure to the benefit of a surety who satisfies the creditor?

2. Concerning the form required by section 15, paragraph 4 of G.M.B.H. (Act relating to Associations with Limited Liability.)

Second Civil Division. Judgment, Dec. 8, 1916, in the matter G. (plaintiff) vs. C. G. H. (defendant). No. II. 307/16.

I. (First Instance) Superior Court, Bremen.

II. (Second Instance) Court of Appeal, Hamburg.

Defendant H. was the personally liable partner and liquidator of the commandite partnership C. G. H. & Co. in liquidation. This firm owned a considerable claim against the mercantile trader S. Hus, as well as against the limited-liability association 'S. Hus.' As security for this claim shares of limited-liability association S. Hus in the par value of RM 48,000 had been transferred. On the other hand S. Hus and his limited-liability association raised claims against C. G. H. & Co. On Jan. 16, 1912 an agreement set forth in a private written

document was entered into, the contracting parties of which were defendant, for himself and for C. G. H. & Co.; also S. Hus and his limited-liability association; furthermore the M. Bank for Commerce and, finally, plaintiff G. The text of this agreement reads as follows:

> "Mr. G herewith assumes the irrevocable obligation to refund to the firm C. G. H. & Co., or its liquidator Mr. H., the amount of RM 11,000 not later than the 20th inst. and he herewith assumes the suretyship as debtor towards the firm C. G. H. & Co. and its liquidator as to the afore-mentioned RM 11,000. The payment shall be on account of the debt of Mr. S. Hus or of his limited-liability association owed to the firm C. G. H. * * * [Translator's Note: Omissions are in the original decision.]
>
> "The Bank for Commerce puts at the disposal of Mr. G. the afore-mentioned RM 11,000 at the rate of 6% interest per annum, and Mr. G. pledges the following mortgages on real estate. * * *
>
> "Mr. G. is under the obligation to repay the afore-mentioned separate credit amounting to RM 11,000 with the M. bank for Commerce, not later than Dec. 31, 1912.
>
> "With the settlement of this separate account of RM 11,000 with the M. Bank for Commerce all eventual demands and claims of the firm C. G. H. & Co. against Mr. S. Hus and the Hus

limited-liability association are to be considered as extinguished; Mr. S. Hus and the limited-liability association S. Hus, likewise waive in that event all their eventual demands and claims of any kind against the firm C. G. H. & Co. and its liquidator. All the securities which are in the possession of the firm C. G. H. & Co. as security for its claim against S. Hus and the limited-liability association are to be assigned to Mr. G. in the event of the aforementioned settlement. * * *"

After the RM 11,000 had been paid by the M. Bank to the defendant and by the plaintiff to the bank, the plaintiff demanded repayment of this sum and interest by the defendant. He asserted that the transaction needed judicial or notarial authentication as provided in section 15, paragraph 4 of the Act Relating To Associations With Limited Liability, because it constituted merely a purchase by plaintiff of the shares transferred to the firm C. G. H. & Co. The defendant denied that anything else occurred other than the assumption of a suretyship.

Both lower courts dismissed the complaint; the appeal for revision also was unsuccessful.

Grounds

The judgment attacked is rested upon the assumption that the agreement dated Jan. 16, 1912 did not require judicial or notarial authentication as provided in section 15, paragraph 4 of the Act Relating to Associations With Limited Liability,

although it stipulated the obligation of assigning to the paying surety the shares which were previously transferred to the creditor as security. This opinion is to be approved of. It is true that the shares of the firm H. were not pledged but the ownership was transferred as security. Considering the nature of the legal relationship created by this transaction, by which the firm acquired the shares absolutely as owner and was only obligated by contract to reassign the shares, it is not permissible to apply directly sections 401, 412 of the Civil Code. The shares were not transferred to the plaintiff by operation of law, notwithstanding the transfer of the claim. (Sec. 774, Civil Code.) However, in their economic effect a transfer of ownership as security and the giving of a pledge are very similar or even coincide. The fiduciary, like the pledgee, is given the right for the purpose of his security only; he must not keep it longer than is necessary for this purpose. Therefore, having due regard to sections 157, 242, Civil Code, it must be considered without doubt as the will of the contracting parties that the creditor and owner by way of security must transfer the right to the surety from whom he has recovered satisfaction and that the principal debtor consented in advance to such a transfer. Since the obligation to make such transfer constitutes a self-evident consequence of the legal relation, an explicit promise to make the transfer, inserted in the agreement only for purposes of clarity, did not

require the formal authentication provided for in section 15, paragraph 4 of the Act Relating to Associations With Limited Liability. The Supreme Court has uniformly limited this form provision to such cases in which the obligation to make a transfer constituted the essence of the agreement. If the principal aim of the contract is something else, and if said obligation constitutes only a legal incident following from the main purpose of the contract, there is no necessity for a judicial or notarial authentication. (Cf., RGZ. [Translator's Note: Decision of the Supreme Court] Vol. 82, page 354 with supplement.)

Plaintiff also does not dispute these decisions in principle. Yet, he maintains the point of view that the document of the contract has to be interpreted in another way and the appeal for revision complains that the witnesses which were named as evidence for this point were not heard by the court. However, another interpretation could be taken into consideration at the utmost only in so far as it might be possible to assume that there was not a suretyship but an assumption of the debt as a joint debtor. This assumption would not further the matter in any respect. Since in the relation of the joint debtors to each other the debt would, contrary to the rule in section 426, Civil Code, remain the burden of Hus (or his limited-liability association) the result would still be that the transfer of the shares could be demanded as an incident of the assumption

of the debt. The statement of the plaintiff on which statement he bases the alleged violation of the form —namely, that he purchased the shares—does not have anything to do with the question concerning the interpretation. This statement only concerns plaintiff's relations to Hus, which relations are not mentioned in the document. The matter provided for in this document is confined to the intercession from which it ensues that the firm H. must transfer the shares to the plaintiff after having received satisfaction. As to whether or not Hus is then entitled to redeem those shares from the plaintiff or whether plaintiff is entitled to keep them permanently instead of a regress, may have been the subject of an agreement between the two of them. The legal transaction of Jan. 16, 1912 does not contain anything related to this and the validity of its form cannot be doubted because of this relation which is outside of the contract.

[Endorsed]: Filed Sept. 27, 1940.

HANS SCHWARZER

(Recalled)

Cross Examination

Q. By Mr. Selvin: Is there any difference in Germany between the notarial fees for merely acknowledging a signature and one for authenticating an assignment of a claim?

(Testimony of Hans Schwarzer.)

A. I can't answer yes or no, because there is the different conditions. The difference is—just a second. To assign a claim it isn't necessary that the notary have knowledge of the signatures. The fee is different where the notary executed the document than where he only notarized the signatures. That is the difference in the fee.

Q. Do you know what those fees were at the time this document was signed by the notary? Whatever it was, do you happen to know what the fees were, and if you do, can you tell whether that represents a fee for authenticating a document, or a fee for merely notarizing the signature?

A. As I told you before, I don't have to consider it. I don't know the fees by heart.

The Court: Well, just answer the question, whether the size of the fee indicates one or the other?

A. I can't. I would suggest you ask Mr. Pinner, because he was a notary. I wasn't. But please let me explain. The fee would be different if the notary executed and pre- [456] pared this instrument than where he notarized only the signature. This is the difference in the fee.

Q. By Mr. Selvin: Would the nature of the document make any difference?

A. Only insofar as there are some documents which have to be prepared by the notary; and an assignment doesn't have to be prepared by a notary. It doesn't have to be notarized or——

(Testimony of Hans Schwarzer.)

Q. Suppose an assignment is notarized, whether that has to be done or not, would the notary charge the same fee for that as he would for notarizing a signature?

A. The difference would be the same; depending on whether he prepared it or whether——

Q. Is there any requirement that the document bear tax stamps or revenue stamps?

A. There is a requirement that an assignment—I think it is one per mill—one per cent. It is one mark on 100, I think. I am not quite sure. But it isn't a revenue stamp. But that doesn't make the document invalid.

The Court: The revenue stamps are attached? They don't use the French papier timbre?

A. No, they don't use the papier timbre.

Q. By Mr. Selvin: Is there any indication, on this letter of February 20, 1936, that there were any such stamps affixed or attached to it?

A. No; as far as I can see they were not. [457]

Q. There were none of those stamps on that?

A. No.

Mr. Selvin: I would like to say this: When plaintiffs' case in chief was closed, Mr. Hirschfeld said that if there should be a judgment against the defendant it was his idea that the date of the judgment in Germany, that is, the judgment of the Kammergericht, which I think was July 27, 1932, was the proper date for computing its value in dollars. I am willing to accept that suggestion, if that question becomes material.

(Testimony of Hans Schwarzer.)

The Court: What is the date?

Mr. Selvin: July 27, 1932, was the date, I think. Isn't that the date you suggested? [458]

[Endorsed]: Filed Aug. 4, 1942.

[Endorsed]: No. 10014. United States Circuit Court of Appeals for the Ninth Circuit. John Luhring and Margaret Morris, as Joint Tenants, Appellants, vs. Universal Pictures Company, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 2, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10014

JOHN LUHRING and MARGARET MORRIS, as Joint Tenants,
Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES CORPORATION, a Corporation; and UNIVERSAL PICTURES COMPANY, INC., a Corporation,
Defendants and Appellees.

STATEMENT OF APPELLANTS' POINTS RELIED UPON IN APPEAL

To the Defendant and Appellee, Universal Pictures Company, Inc., a Corporation, and to Messrs. Loeb and Loeb and Herman F. Selvin, Esq., Its Counsel:

To the Clerk of the Above Entitled Court:

You and each of you will please take notice that the appellants hereby state the points upon which they intend to rely on this appeal in this action are as follows:

1. That the judgment is contrary to law.
2. That the judgment is contrary to the evidence in the case.
3. That the evidence is insufficient to justify and support the judgment in the case.

4. Errors in law occurring at the trial apparent on the face of the record prejudicial to the appellants and excepted to by said appellants.

5. The trial court erred in refusing to give any evidentiary effect to the declaratory judgment between the Bank for Foreign Commerce and May Film A.G. (Plaintiffs' Exhibits 3 and 4), which adjudged that Joe May and not May Film A. G. was the owner of the claim and judgment sued upon herein, merely because defendant herein was not a party thereto. Such judgment was admittedly valid, binding, conclusive and final between the parties thereto, the only persons between whom a dispute then existed as to the ownership of the judgment sued upon herein, and therefore was entitled to receive and should have been given evidentiary effect herein as the foundation of and as a muniment of plaintiffs' chain of title.

6. The trial court erroneously admitted over objection defendants' and appellees' oral opinion evidence based upon hypothetical questions, attempting to collaterally impeach the declaratory judgment between the Bank for Foreign Commerce and May Film A. G. (Plaintiffs' exhibits 3 and 4), which adjudged that Joe May and not May Film A. G. was the owner of the judgment sued upon herein, and that the assignment from Joe May to said Bank was valid, under the claim that the declaratory judgment under German law was erroneous, and therefore did not operate as an adjudication of the ownership of the judgment

sued upon herein between the parties to said judgment. Said declaratory judgment admittedly was valid, binding, conclusive and final between the parties thereto and defendant appellee, a stranger thereto, and not prejudicially affected thereby, could not thus collaterally attack said judgment, which constituted a foundation of and a muniment of plaintiffs' chain of title herein.

7. The trial court, after receiving the opinion evidence based upon hypothetical question as to the force and effect of the said declaratory judgment from the witnesses for the defendant appellee improperly refused to allow and admit proper evidence offered by the plaintiffs-appellants tending to show that in fact there was a sale and assignment of the claim and judgment in question from May Film A. G. to Joe May, and that at said time May Film A. G. had no creditors.

8. The trial court erred in admitting over objection opinion evidence offered on the part of the defendant appellee as to the written law of Germany, in that the written law of a foreign country is only proved by the same or a copy thereof or by the books containing the same, and cannot be proved by the oral opinion testimony of witnesses as to the written law.

9. The trial court erred in holding that there was no assignment from the Bank for Foreign Commerce to Fritz Mandl by operation of law, in that under Section 774 of the German Civil Code, the said claim and judgment was transferred to

Fritz Mandl by operation of law, upon his payment to the said bank of the claim for which the said judgment and claim was given as security.

10. The trial court erred in holding that plaintiffs-appellants could only prove an assignment from the Bank of Foreign Commerce to Fritz Mandl by operation of law when the evidence offered and received showed that there was in addition thereto an actual assignment, and that the issue as to the actual assignment was created by the evidence without any objection on the part of the defendant-appellee. Issues created by the evidence are just as much a part of the case to be determined as issues created by the pleadings.

11. The trial court erred in holding that only the German law was applicable in determining whether there was an assignment from the Bank for Foreign Commerce to Fritz Mandl, in that the written document from the bank to the defendant-appellee dated February 25, 1936, (Plaintiffs' exhibits 5 and 11), was received by defendant-appellee in New York, and its force and effect is to be determined by the law of the place where the same was received, the place wherein the obligations of the defendant-appellee thereunder were fixed, and where the obligation created thereby was to be performed, to wit: New York, and under such circumstances the force and effect of said document as an assignment was to be determined by the law of New York whereunder the document constituted a legal assignment.

12. The trial court erred in holding and finding that under Section 409 of the German Civil Code the aforesaid document, dated February 26, 1936 and the acts in reference thereto did not constitute an actual assignment of the claim and judgment sued upon from the Bank for Foreign Commerce to Fritz Mandl.

13. The trial court erred in holding that since the plaintiffs-appellants did not plead anything but an assignment by operation of law, in respect to the assignment from the Bank for Foreign Commerce to Fritz Mandl, that no other form of assignment could be proved, in that the issue as to an actual assignment was created by the evidence without objection and that under the Federal Rules, of Civil Procedure, great liberality is given in respect to the pleadings in that issues created by the evidence should also be determined so that the case may be tried upon the merits irrespective of the form or sufficiency of the pleadings.

14. The trial court erred in holding that the claim and judgment sued upon were at all times since the rendition of the judgment sued upon the property of May Film A. G., in that under the German law and under and by virtue of *an* final judgment rendered by a German court of competent jurisdiction between the parties thereto, it was conclusively adjudicated in the aforesaid declaratory judgment, as between the two and only claimants as to said claim and judgment sued upon, that the same belonged to Joe May and not to

May Film A. G. and that no competent evidence was offered or received in this cause to overcome such adjudication, and the same could not be collaterally attacked herein.

15. The trial court erred in holding and finding that the judgment sued upon since its rendition has been and now is enforceable only against the defendant-appellee only by the May Film A. G. in that the evidence shows that May Film A. G. no longer was and is the owner of said judgment or claim upon which it is based, and that the same was transferred from May Film A. G. to Joe May, firstly, by purchase and assignment, and most certainly by the aforesaid declaratory judgment and assigned by Joe May to the said Bank for Foreign Commerce and by the Bank for Foreign Commerce to Fritz Mandl and by Fritz Mandl to the Union Bank and Trust Company, and by the Union Bank and Trust Company to the plaintiffs.

16. The trial court erred in holding and finding that under and by virtue of the law of the German Reich the said declaratory judgment had no effect upon the rights of the defendant herein in respect to the claim referred to in the judgment or in respect to the ownership of the claim and was not and is not evidence against either of the defendants herein of any of the facts or issues determined or purported to be determined therein, in that the said declaratory judgment under German law was admittedly binding and conclusive upon the parties thereto and under the law of the State

of California was admissible in evidence as the foundation of or muniment of title on behalf of the plaintiff and appellants and constitutes prima facie evidence on behalf of the plaintiffs-appellants and against the defendants-appellees.

17. The trial court erred in holding and finding that under and by virtue of the law of the German Reich Joe May did not acquire or succeed to the ownership of any part of the judgment sued upon herein or to any part of the claim upon which said judgment was based, in that the aforementioned declaratory judgment admittedly conclusively adjudicated between the May Film A. G. and Joe May and the Bank for Foreign Commerce, the only parties then claiming ownership of or any interest in and to the said judgment and claim, that Joe May and not May Film A. G. was the owner of the claim and judgment sued upon, and that any opinion evidence as to the force and effect of said judgment was inadmissible herein to collaterally attack the said judgment by a stranger thereto, and such judgment constituted prima facie evidence in favor of the said plaintiffs-appellants herein, and could not be and was not overcome by inadmissible opinion evidence.

18. The trial court erred in finding that the facts upon which it was claimed that Joe May acquired the ownership of the said judgment sued upon were insufficient under German law to transfer or vest the ownership of the judgment and claim upon which it was based in Joe May, in that

such finding was and is based upon incompetent opinion evidence and is in direct contradiction to the aforesaid declaratory judgment adjudicating between the two claimants to said judgment sued upon herein that Joe May was the owner thereof and not May Film A. G., and such evidence constitutes a collateral attack upon the said declaratory judgment by a stranger thereto with no rights prejudicially affected thereby.

19. The trial court erred in holding and finding that the Kammergericht found that the claim which is the foundation of the judgment sued upon herein was not transferred to or acquired by Joe May, and that such finding was and is conclusive determination of that issue as between Universal Pictures and its successors, and the May Film A. G. and its successors on the other hand, in that the said Kammergericht did not in fact find that Joe May was not the owner of the said claim and that the only issue between the parties to said action, to wit: May Film A. G. and Universal, and the only finding made by the said Court in that respect was upon the issue as to whether May Film A. G. was the proper party plaintiff and that the said decision and judgment of the Kammergericht does not either under the German law or under the law of California constitute an adjudication that May Film A. G. and not Joe May in fact owned the claim, for the reason that the rights between Joe May and May Film A. G. were not adjudicated in the said Kammergericht action, since Joe May and

May Film A. G. were not adverse parties therein, and Universal did not claim ownership in itself and therefore the court could not and did not adjudicate as between May Film A. G. and Joe May the actual ownership of the claim and the rights between May Film A. G. and Joe May as to the ownership could not be litigated in an action wherein Joe May was not a party and particularly wherein Joe May and May Film A. G. were not adverse parties. Furthermore, the statement in the Kammergericht decision upon which the trial court purported to make its finding was and is only dictum to the said decision and even though the trial court may have construed the Kammergericht judgment as determining the ownership of the claim as of July 22, 1932, nevertheless, such a finding could not constitute a conclusive finding as to the ownership of the claim and judgment sued upon herein at any date subsequent thereto, and the declaratory judgment between the two claimants, to wit: May Film A. G. and Joe May, rendered at a subsequent date did and must nullify any finding by the trial court as to the issue of res adjudicata, for said declaratory judgment having occurred subsequent to the rendition of the Kammergericht judgment, would be equivalent to an assignment from May Film A. G. to Joe May as of the date of the rendition of the declaratory judgment and such evidence would be prima facie evidence in favor of the plaintiffs-appellants herein and against the defendant-appellee herein as to

the ownership of the judgment sued upon and the claim upon which it is based at a date subsequent to the date of the said Kammergericht judgment.

20. The trial court erred in holding and finding that under the laws of the German Reich, none of the transactions between the Bank for Foreign Commerce and Fritz Mandl had the effect of transferring to or vesting in Fritz Mandl the claim and judgment sued upon herein, in that the undisputed facts show that said judgment was assigned to the Bank for Foreign Commerce as security and that Fritz Mandl guaranteed the payment of the claim for which said judgment had been assigned as security and Fritz Mandl having been compelled to and did pay the claim for which the judgment was given as security, under the German law was entitled to receive by operation of law an assignment of the security as well as the debt which he was required to pay, and the defendant having offered no evidence showing that the facts which constituted the basis of the assignment to Fritz Mandl of said judgment sued upon, in fact did not exist, the finding of the trial court to the contrary is erroneous and contrary to law and to the evidence.

21. The trial court erred in refusing to permit the plaintiffs-appellants from introducing competent evidence to show the existence of the facts which gave rise to the assignment of the judgment sued upon herein from the Bank of Foreign Commerce to Fritz Mandl.

22. The trial court erred in finding that the facts as a result of which it is claimed that Fritz Mandl acquired or succeeded to the judgment or claim sued upon herein did not have the effect under German law of transferring to or vesting in Fritz Mandl any part of the right, title or interest of the said Bank of Foreign Commerce in and to the said judgment and claim, in that under the law of the German Reich, particularly Section 774 of the German Civil Code, such facts were sufficient to transfer the claim and judgment sued upon in its entirety to Fritz Mandl.

23. The evidence herein is insufficient to justify or support the judgment rendered herein, and in fact is contrary thereto, in the following particulars:

(a) That there is no evidence proving or tending to prove that that portion of Finding of Fact No. III to the effect that under and by virtue of the law of the German Reich, said judgment and the claim on which it was based, were at all times since and have remained the property of May Film A. G. and in the German Reich and by virtue of the law of that country, said judgment at all times since its rendition has been and now is enforceable against the judgment debtor, or its successors, only by the May Film A. G., the judgment creditors, in that: the evidence in this action shows that under and by virtue of the aforementioned declaratory judgment, the judgment sued upon and the claim upon which it is

based, belonged to Joe May and not to May Film A. G., and the opinion testimony of the defendants-appellees' witnesses based upon hypothetical questions, was incompetent to impeach said judgment, and the same does not constitute any evidence upon which the aforementioned Finding can be supported, and the aforementioned Finding is in fact, contrary to the evidence in this case. Furthermore the evidence shows that under the law of Germany, the aforementioned declaratory judgment was valid, binding and conclusive upon the parties thereto, and under such German law and judgment, the judgment and claim in question belonged to Joe May and not May Film A. G.

(b) That there is no evidence in this case proving or tending to prove that that portion of Finding No. IV to the effect that under and by virtue of the law of the German Reich, said declaratory judgment had no effect upon the rights of the defendant in respect to the claim referred to in said judgment, or in respect to the ownership of said claim, and was and is not evidence as against the defendant herein, or any of the facts of issues determined or purported to be determined therein, in that, the purported evidence attempting to support such a find is incompetent opinion evidence attempting to show that the said judgment was erroneous as a matter of law, notwithstanding that the judgment admittedly was binding, conclusive and final as between the parties thereto, and since as the evidence shows that the defendant appellee

herein at no time claimed ownership to the judgment adverse to the plaintiffs or any of plaintiffs' predecessors, said defendant-appellee could not show that as between the claimants to the ownership of said judgment that the said judgment was erroneous, and that is in effect what the defendant appellee attempted to show by its opinion testimony, and the aforementioned Finding is in fact contrary to the evidence in the case, to wit: the adjudication found in the aforementioned declaratory judgment.

(c) There is no evidence proving or tending to prove Finding No. V, in that, the only purported evidence offered in respect thereto by defendant appellee is opinion evidence based upon hypothetical questions and not upon the facts in the case, and attempts to impeach an admittedly final and conclusive judgment between the parties to the said judgment, to wit: the only claimants as to the ownership of the judgment sued upon and the claim upon which it is based, and since said Finding is contrary to the adjudication found in the declaratory judgment, it is contrary to the evidence in this case.

(d) There is no evidence proving or tending to prove that Finding VI, in that no evidence whatsoever was offered by the defendant appellee to prove or tending to prove that the said judgment of the Kammergericht referred to therein was and is conclusive determination as between Universal Pictures Corporation and its successors on the one

hand and May Film A. G. and its successors on the other hand, as to the ownership of the claim sued upon in said action, and the judgment itself shows that the sole issue determined by the Kammergericht in that respect was that the plaintiff, May Film A. G. was the proper plaintiff and did not go any further, and could and did not affect the ownership of the claim as between the claimant, Joe May and May Film A. G., for Joe May was not a party thereto, and if any way connected with said action, was not an adverse party to May Film A. G., and the evidence further shows that the said Kammergericht judgment was not conclusive and res adjudicata as between Joe May and May Film A. G. respecting the ownership of the judgment sued upon and the claim upon which it is based, in that the evidence shows that under the German law and by the aforementioned declaratory judgment, it was determined that the Kammergericht judgment was not res adjudicata as to the issue of ownership between May Film A. G. and Joe May, and that in an action wherein their respective rights were adjudicated and wherein Joe May and May Film A. G. were adverse parties, it was conclusively adjudged under German law that Joe May and not May Film A. G. was the owner of said judgment and claim; therefore the aforementioned Finding is also contrary to the evidence.

(e) There is no evidence proving or tending to prove Finding No. VII, in that defendants offered no testimony whatsoever to refute plaintiffs' claims

that the aforementioned claim and judgment was assigned to the Bank for Foreign Commerce as security for a debt of May Film A. G. by its owner, Joe May; that Fritz Mandl became a surety upon said obligation of Joe May and was called upon to and did pay the obligation and that therefore under the German law, Fritz Mandl was entitled to and did succeed to all the rights, including the ownership of the judgment in question, which the evidence showed to be the facts, and the evidence further showed that there was in fact an assignment from the Bank for Foreign Commerce to Fritz Mandl, and that the letter in question constituted an assignment in fact, both under German and under American law; therefore, the aforementioned Finding is also contrary to the evidence in the case.

24. The said decision and judgment herein is contrary to law in that:

(a) The failure of the trial Court to hold that the aforementioned declaratory judgment constituted evidence in favor of the plaintiff-appellants and against the defendant-appellee is contrary to law, in that under the law of this State, and of Germany, the aforementioned judgment was final, binding and conclusive between the parties thereto and constituted prima facie evidence in favor of the plaintiff-appellants and against the defendant-appellee herein in support of the plaintiffs-appellants' foundation or chain of title.

(b) The trial court's failure to hold that under the facts in the case at bar, there was an assign-

ment by operation of law from Bank for Foreign Commerce to Fritz Mandl as provided by the German law, is contrary to law.

(c) The trial court's failure to hold that there was in fact an actual assignment from Bank for Foreign Commerce to Fritz Mandl, is contrary to law, both under the German and American law, including that of the State of New York and California.

(d) The trial court's failure to hold that the Kammergericht judgment was not res adjudicata upon the issue of the ownership of the judgment herein and the claim upon which it is based, is contrary to both the German and American law.

(e) The trial court's failure to find that the transaction had between Joe May, Bank for Foreign Commerce and Fritz Mandl, and the judgment sued upon herein or the claim upon which it was based, had the effect of transferring to or vesting in Fritz Mandl the right, title and interest in and to the said judgment or claim sued upon, is contrary to the law of Germany.

(f) The trial court's failure to hold that there was in fact an actual assignment from the Bank for Foreign Commerce to Fritz Mandl is contrary to law, both of the law of Germany and of the United States.

(g) The trial court's holding that the plaintiffs or any of the predecessors in interest, other than May Film A. G., have any right, title or interest in or to the judgment sued upon herein, or in or to the claim upon which said judgment is based, is

contrary to law of both Germany and the United States and of this State.

(h) The trial court's failure to render judgment in favor of the plaintiffs-appellants and against the defendant-appellee is contrary to law.

25. The trial court erred in denying plaintiffs-appellants' motion for new trial on the following grounds:

(a) Errors of law occurring at the trial, apparent upon the face of the record, prejudicial to the plaintiffs and excepted to by said plaintiffs.

(b) Newly discovered and material evidence, discovered since the trial which could not have been obtained and produced on the trial, by the exercise of reasonable diligence.

(c) Accident and surprise which could not have been guarded against by ordinary prudence.

(d) That the judgment and decision is contrary to the evidence.

(e) That the decision and judgment is contrary to law.

(f) That the decision and judgment is unsupported by the evidence.

(g) That the evidence in the case is insufficient to justify the decision and judgment.

Respectfully submitted,

ELLIS I. HIRSCHFELD and
SAMUEL W. BLUM
By SAMUEL W. BLUM
Attorneys for plaintiffs-appellants

[Endorsed]: Filed Jul. 21, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RELATING TO RECORD ON APPEAL HEREIN

It is hereby stipulated and agreed, by and between the plaintiffs and appellants John Luhring and Margaret Morris, and the defendants and appellees, Universal Pictures Company, Inc., by and through their respective counsel as follows:

1. That if during the course of this appeal herein, it shall appear that there is any part or portion of the record of this case in the possession of the clerk of the District Court of the United States, Southern District of California, Central Division, which has not been transmitted by the clerk of said District Court to the clerk of the above entitled court, and that the same, or any part thereof is, or shall be, necessary, required, essential or material, for a proper and complete presentation, consideration or determination of this appeal upon the merits, that such record or any part or portions thereof, upon the stipulation of the parties hereto, or upon the request or application of either or both of the parties hereto, in pursuance hereto and without further motion, shall be transmitted forthwith to the clerk of the above entitled court by the clerk of the said District Court, and that the same shall be considered by the above entitled court in connection with the appeal herein, and that a supplemental transcript of record of the same shall be prepared

and printed at the expense of the party requesting the same.

2. That, if during the course of this appeal herein, it shall appear that there is any part or portions of the transcript of record on appeal herein, which has not been designated for printing and which has not been printed herein, and which is or shall be necessary, required, essential or material for a proper and complete presentation, consideration and determination of this appeal upon the merits that such part or portions of the said record may be designated by the party requesting the same, and counter designations in respect thereto may be made by the other party, together with the necessary points relied upon in respect thereto, and that the same shall be considered by the above entitled court in connection with the appeal herein, and a supplemental transcript of record of the same shall be printed herein at the expense of the party requesting such designation.

3. That, if during the course of this appeal it shall appear that the designation of the points relied upon herein are or shall be deemed incomplete, insufficient or incorrect for a proper presentation, consideration and determination of this appeal upon the merits, that the same, or any part thereof, may be amended, supplemented, corrected, changed or completed upon the stipulation of the parties hereto, or upon the application or request of the parties hereto, or either of them, in pursuance hereto, and without further motion, at the expense of the party

requiring the same, and that the same shall be considered by the above entitled court in connection with this appeal.

4. That any and all court rules and statutes to the contrary relating to, or concerning the matters herein contained, are hereby dispensed with and waived.

Dated this 31 day of August, 1942.

LOEB AND LOEB
By MILTON H. SCHWARTZ
Attorneys for appellee Universal Pictures Company, Inc.
ELLIS I. HIRSCHFELD and
SAMUEL W. BLUM
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[Endorsed]: Filed Sep. 29, 1942.